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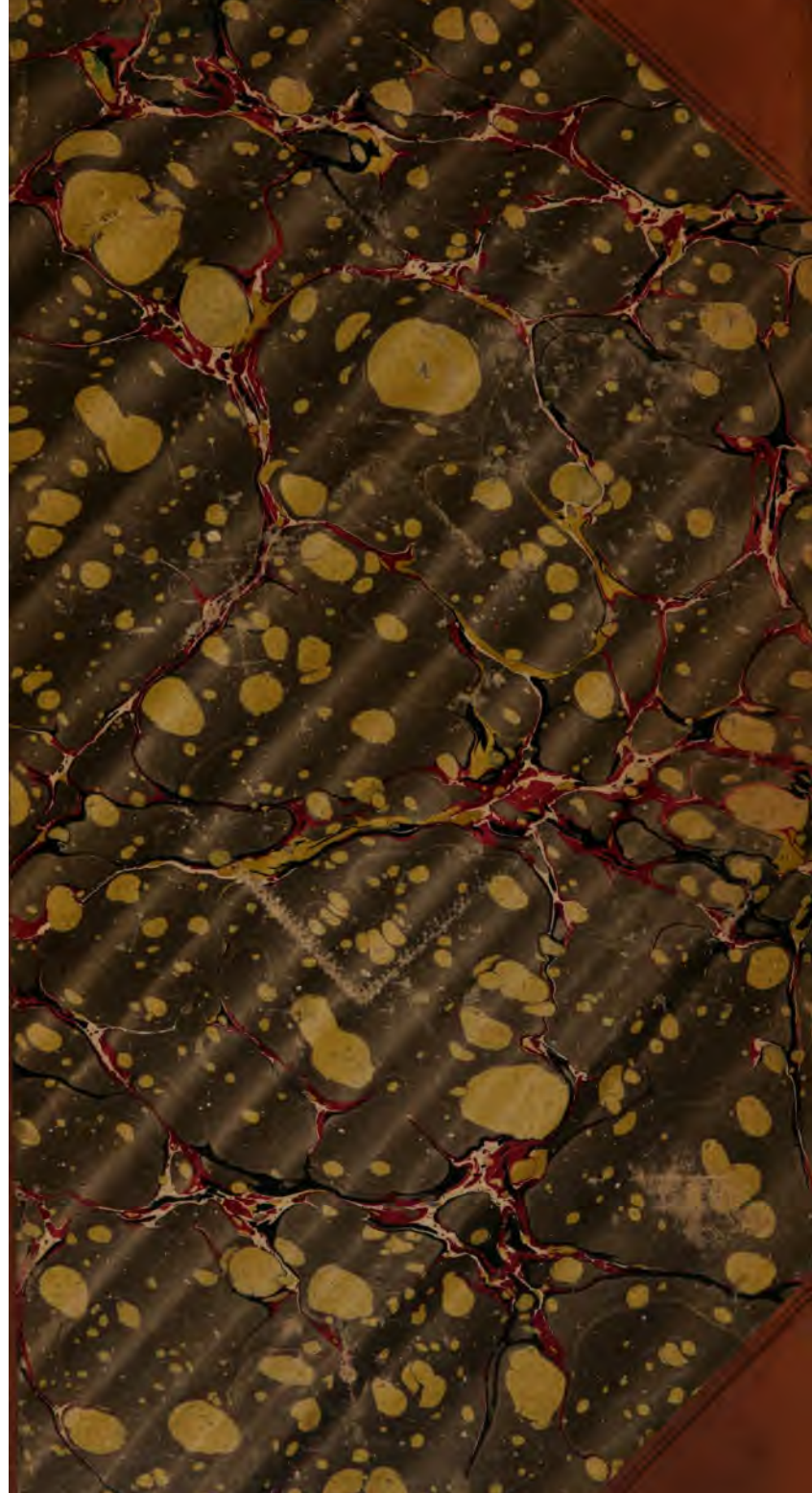
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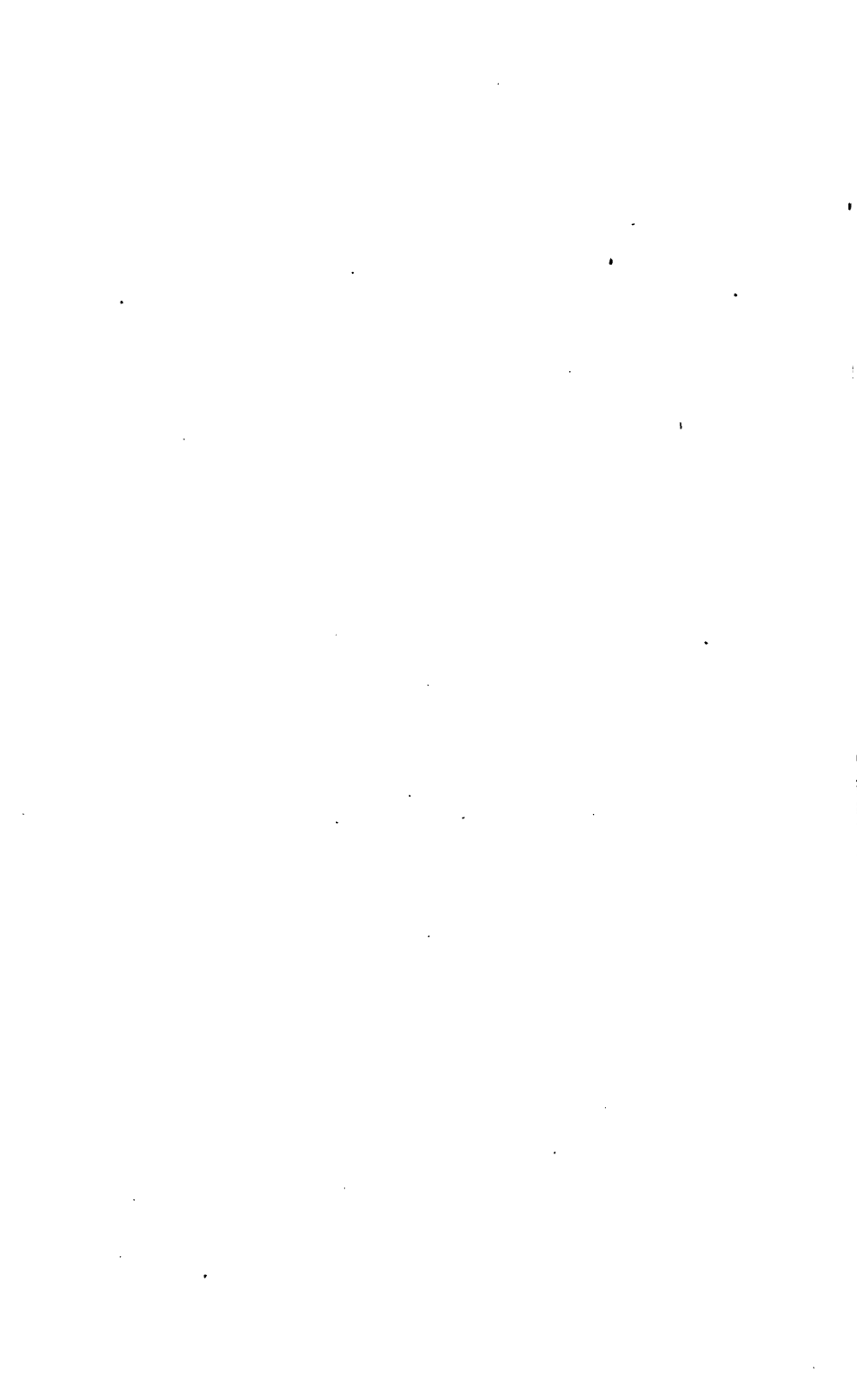
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THE
LAW REVIEW.

ART. I.—FRENCH REPUBLIC.—FRENCH LAW
AMENDMENT.

It is quite superfluous for us to observe, that we have no vocation (what our French neighbours call *mission*) to discuss any political questions, and that we most willingly avail ourselves of this exemption to avoid entering upon the dark and difficult subject of the late strange, and purely accidental revolution in France. Those, who the most seriously and calmly reflect upon it, will perhaps be the most apt to look back with wonder upon the extraordinary sagacity of Mr. Burke, displayed sixty years ago in a work, the remarkable eloquence of which is only its second title to admiration, the wisdom of its thoughts far surpassing the magic of its diction; nor, indeed, does the only considerable error which he subsequently admitted into his writings on the same great subject—the error of viewing France as consisting only in the exiles and the emigrants—fail to receive some kind of countenance from the difficulties ever since felt of maintaining an orderly system of government without the aid of an hereditary nobility.¹ Our

¹ The wanderings of such men, as with the honest, amiable, and gallant Lafayette, thought to surround a monarchy with republican institutions, are now confessed by all. But Mr. Burke's error was in not perceiving that he could not by a wish restore the nobles. Doubtless the attempt was never fairly made; and had he survived to 1814, he would probably have perceived and admitted that possession for a quarter of a century rendered a restoration of forfeited property impossible.

business, however, is with a sub-department of this vast theme, a most important one, doubtless, but one, in surveying which we happily have fixed principles, to which an appeal may always be made. The late revolution has an intimate connection with our present subject, the Judicial Department, both as regards its causes and its probable consequences.

In referring to the errors committed by M. Guizot, every right and generous feeling must now prescribe as much forbearance as the paramount interests of truth will permit; and we shall use less harsh language towards those errors, than we did long before they had worked his downfall. Assuredly, the most fatal of them was his suffering the great office of Minister of Justice to be vested in such hands as those, first, of M. Martin (Du Nord), afterwards of M. Hebert, whose conduct made the friends of improvement, and even of judicial purity, almost lament the loss of his unworthy predecessor. The appointment of a man like M. Martin was, as we repeatedly had occasion to show, wholly without excuse. A lawyer of third-rate station at a provincial bar, of the most contracted notions on all subjects, of manifest incapacity in his peculiar department, only supplying all other defects, both of reputation and of capacity, by his zeal for the Jesuit party, to whom his nomination was a plain and undeniable concession—this person signalled his accession to power by the famous law of 1840, on the “*Annonces Judiciaires*,” whereby the Press, that is, the newspapers, were bribed to support the Government, and bribed through the agency of the Courts of Justice; and thus the Judges, as well as the journalists, were brought within the vortex of corruption, the former as its instruments, the latter as its subjects. We have in former numbers explained this at large; and we then took leave to warn the French Government of the risk to which it was thus exposing itself, ever strenuously urging M. Guizot to remove from his ministry so deep and so dangerous a stain. To this, as to so many other efforts of friendly admonition, a deaf ear was, of course, turned by a ministry confident in its parliamentary resources,—that is, its purchased majority.

The like fate attended other warnings. In season and out of season (unfortunately with that ministry all warning was

out of season), we were instant in imploring the French Government to exclude magistrates, but especially the great judges of the land, from seats in the Elective Chamber, and thereby to separate them from political and party pursuits. A recent election had furnished us with new and powerful illustrations of our position. The Chief Judge in France, M. Portalis, first Judge of the Court of Cassation, had been found absenting himself from the functions of his high office for seven months, in order to pass his time in electioneering. He had obtained the return of one son, then upon his death-bed; that of a second, who, being under the age required by law, was consequently unseated, but afterwards, when the age was completed, was again elected; and the father all the while had kept places in the Courts vacant, on purpose to influence voters. The President himself, indeed, being a peer, had no want of a seat; but as all judges, who are not peers, can be elected as Deputies, all judges are suffered, nay, invited, by the law to take part in politics and in party; and we gave one illustration of this in the fact of the Portalis-controlled elections, and another in the mode of canvassing, to which we knew recourse was had in other elections, where a Judge was the candidate, namely, that his canvassing friends plainly hinted to the voters the risk they run, should they, after voting against him, happen to have any lawsuit before the learned Judge. We may now add a third illustration. Since the late revolution, certain of the Judges, who were deputies, and belonged (as all those in the Chamber did) to the notorious majority, whose thick and thin support of the ministry caused its overthrow and the subversion of the monarchy, have been unable to show themselves in the districts which they represented, dreading lest the popular indignation should burst upon them for their political and party misdeeds. It is not without reason that we take this opportunity of recurring to the subject, because our earnest remonstrance against judicial corruption (we can give it no other name) may possibly find more ready listeners among the ministers and the lawyers of the republic than they did amongst those of the monarchy. Indeed, while we write, we have the great

satisfaction of seeing, that the great abuse, first denounced — the “*Announces Judiciaires*” — is already extirpated. The vile law of M. Martin (Du Nord) is repealed by the Provisional Government, and no one can for a moment suppose, that either the National Assembly, or any other body which may succeed to their powers, will ever venture upon reviving so hateful a measure of judicial corruption.

But we have adverted to M. Martin's successor as worse than himself. M. Hebert was a man in station of far more respectable pretensions. He had a considerably higher place in the profession, and had filled offices of importance; he was also believed to be of more enlarged views; but, unhappily, he was of a violent, imperious disposition, and of an unscrupulous nature. Entering the ministry at a time when the opposition was powerful, and when the resolution had been taken to carry things with a high hand, in the blind confidence which a majority, obtained by the full use of influence in all its branches, had generated, M. Hebert at once showed himself the person ready to go all lengths in that direction, and he soon distinguished himself by his zeal — his “*prava diligentia*.” In our last number, we adverted to his proceedings, taken almost as soon as he accepted office, and we showed what a fatal error, on M. Guizot's part, the choice of such a colleague had proved. Nothing had so much shaken the system, not merely of the ministry, but of the monarchy, as the dreadful indications of corruption among official men, which the trial of Tésté and Cubiérés afforded. As always happens, very great exaggeration had entered into the statements on this head, and had affected the opinion of the community. But there was too much foundation for the mistrust of public men; and the more the people were prone to believe in the existence of much more guilt undiscovered, even if those suspicions were wholly groundless, the more imperatively incumbent was it on the Government to take the utmost possible precautions against whatever might tend, in any manner of way, to give these suspicions countenance or confirmation. At the ceremony of opening (inauguration) the statues erected at Aix to the memory of Simeon and Portalis (father of the Chief Judge), speeches were delivered,

which were much more in flattery of the living son, then and there present, than in commemoration of the deceased father. When the turn of M. Borely, the Procureur General, came, he, most properly, and with the dignity which became him, abstained from any such unseasonable panegyric. This, probably, was the real cause of the offence taken at his address. But he also made several very just observations upon the defective state of the law of libel, and of the constitution of juries, complaining, most reasonably, that after a person had been acquitted by a jury when charged criminally with libelling a public functionary, he might be ruined by a civil action for the same libel, the damages being in that proceeding awarded not by a jury but by the Court. The same complaint had often before been made by other magistrates in equally eminent stations, by M. Dupin, Procureur General of the Court of Cassation, among the rest. Immediately after this affair, it pleased M. Hebert to remove M. Borely from his high office, which he had filled, ever since 1830, with universal approbation for his talents, his learning, above all, for his incorruptible integrity. The utmost blame that any one ever dreamt of imputing to this excellent magistrate was, that he had not chosen a proper occasion for his remarks upon the defects of the law. With the violent and unscrupulous Minister of Justice, it was quite enough, that any one under his power should venture to exercise any freedom of opinion. An example was to be made of whosoever should display any independence. But it must be added that M. Borely had proved often somewhat troublesome, when compliances were required, when government was in action, when influence was at work, in a word, when jobs were doing. A man of severe, of somewhat stern, virtue was not to M. Hebert's taste. The Procureur General had been known to disapprove highly of the Chief Judge's late electioneering tactics. He had even declined lending himself to some things, which were wished on the part of the ministry and their supporter Count Portalis. It was whispered, that he had assailed that eminent Judge through the press; and men about M. Hebert hesitated not to charge him with the statements and the remarks given in the pages of this Journal,

respecting that Judge's electioneering proceedings. We are anxious to note this for the purpose of giving the fable the most peremptory contradiction. That paper was written wholly without M. Borely's knowledge, and he never either knew of its existence or of the intention to compose it, until he saw it with the rest of the world printed and published. We must, however, add, that, if he had written every word of it, he had an unquestionable right to do so. M. Portalis was wholly unconnected with him; no tie of any kind existed between them; they were magistrates of classes entirely different, and belonging to courts wholly separate from each other; and if M. Portalis, being a Chief Judge, thought proper also to make himself an electioneerer — a canvasser — a boroughmonger — and to neglect his judicial duties for his political interests, who had a better right than M. Borely, living and acting in the district where M. Portalis's party evolutions were performed, to express, through what channel he chose, his honest reprobation of the misconduct that gave such general offence? That he did no such thing, that the charge or the suspicion circulated of his having done so is wholly without even the shadow of foundation, is an accident which makes the revenge taken upon him the more unjustifiable. But his removal from office would have been without any excuse, had the fact been otherwise, and had all happened to be true, which was falsely laid to his charge.

It is due to truth and justice, that we acquit M. Portalis of all share in this proceeding. Not only did he, as we are informed, abstain from making any complaint against M. Borely, but he expressed himself desirous that the removal should not take place. In fact, he must have felt, or partly felt, uneasy, lest the proceeding should be ascribed to him; and it is confidently asserted, that he expressed his opinion and his wishes against the removal. Others of great weight and authority did the same. The importance of having such a person as M. Borely in the exceedingly difficult office of Procureur General over departments, so delicately circumstanced with respect to political opinions as those constituting the ancient territory of Provence, the long experience of that magistrate, the respect in which he was universally held,

—all concurred to make his remaining in office a thing every way desirable for the Government. But what cared the violent Minister of Justice? Had he not taken office to be a terror to upright doers? Had he not made himself a by-word for rigour? Had he not vowed a vow against all men of squeamish virtue? And then had he not got into a passion? And could he cool down to the temperature of reason without having his own way and a sacrifice? Therefore the Procureur General was dismissed, and M. Guizot submitted, probably saying it was not in his department. But it *was* in his department; and he probably found, before many days were over, that the punishment of an incorruptible magistrate, because of his troublesome virtue, tended little to remove the unhappy impressions left on the public mind by the state trials of the last summer.¹

The proceedings of the same minister, however, after the Chambers met, were incomparably more important, and were, beyond any one other circumstance, the cause of the late change. It was resolved to put down the reform meetings (the banquets) as dangerous, which the Government had persisted in treating as contemptible. This change of opinion, we admit, may have been justifiable, because what at first was not important, may have become so by gathering strength. It is also quite possible, that the resolution to prevent them may have been authorised by the circumstances of the country. On all this we give no opinion; but what we have to do with is, the ground taken by the Minister of Justice. He had dug up out of the mine of Revolutionary Laws, somewhere about 20,000 in number, and which used to be enacted by scores and even hundreds in a day, a declaration against meetings unauthorised by the public authorities. Many lawyers held that this did not apply to one meeting, but only to a succession of meetings, a system of assembling, a permanent meeting, such as that which our Convention Acts struck at in 1817,

¹ We pass over, as beneath contempt, the paltry excuse made, as if it were on account of his deafness that the Procureur General was removed. Suffice it to say, that for above a dozen years this discovery never had been made. A saying, witty enough, was current at the Bar; that his deafness had passed without any observation, till it was found he was not dumb.

and formerly in Ireland. Be that as it may, no one can doubt, that the grossest indiscretion was committed in resting the prohibition upon the old law of 1791, which had fallen into entire oblivion, and was as much in desuetude as a law can be, that for much above half a century, that is, ever since it was passed, had never been acted on. A new legislative measure ought to have been asked of the Chambers, and with such servile majorities as the Government had secured, it would have been granted for the asking. But not so thought the violent and arrogant Minister of Justice. He had found the old law, and act upon it he would at all hazards.

Previous to this, the last act of his overbearing folly, he had irreparably injured his credit with all reflecting men by his conduct on the charge of corruption, brought against the ministry for the traffic in places and resignations in the affair of Pettit. Of M. Guizot's own personal purity we have not the most remote doubt; his errors are of a wholly different kind from the taint of corruption. But he took a very unfortunate mode of defending the Government on that memorable occasion; and his Minister of Justice took a still worse course. He declared, that the traffic in question had been found legal by the sentence of a court, and must so be considered. M. Dupin, by far the highest authority among French magistrates and in the Chamber of Deputies, one from whom there really could hardly be an appeal, at once denied the legality contended for; and affirmed that, if any such decision had ever been pronounced, it was wholly unknown to him, and must have been protested against, and would have been overruled, had it ever come to his knowledge. It turned out, that the case in question was a very recent one, in a provincial court, and upon what is only technically to be called an office; namely, a *debit de tabac*, the sale of tobacco by individual shopkeepers under the excise, which holds that traffic, as a government monopoly, for purposes of revenue. Can bad faith go much further than that of the Minister of Justice, who ventured to represent this as a parallel case? But the majority, prepared to vote black white, was quite satisfied with the precedent; and for the present, that is, till they saw, that M. Hebert was not given

up by his colleagues, or that his colleagues were not themselves abandoned by the Crown, the same pure and patriotic majority were satisfied with M. Hebert and his conduct.

Our object in making these remarks is to show how important a share in the late events has been borne by the mal-administration of the great judicial department. But when we once more look at the radical defect in the judicial system, we shall be still more convinced of the connection which it is the purpose of our present argument to establish. The conduct of the majority has been already adverted to. Its composition remains to be noted. In reference to the present question great pains had been bestowed by the ministers in securing a preponderating force of adherents at the last general election. The limited number of the voters, not above 250,000 for all France, rendered this easy, provided due appliances were at hand; for it is certain, that when the number of electors in any given place is much reduced, a difficulty arises in the way of the party who would secure their votes; each person becomes of such importance, that he must be prevailed upon individually; in other words, all the machinery of influence must be put in motion. Now, in France, two things are certain; one is the existence of a most numerous class of public functionaries of all kinds, down to the most insignificant; and another is the rage for having some office, some connection with the state, which universally prevails, and makes all, or nearly all, Frenchmen incapable of comprehending, how any one can have importance, almost how any one can have respectability, who has not that connection. This feeling has, if not grown up, yet certainly been exceedingly diffused, since the first Revolution; and the indefinite division of property gives it daily extension. It is a feeling which, of course, operates on voters most powerfully during elections, and it operates as powerfully on the deputies, after the elections have ceased. Nothing can be more shameless, as we have learnt from undoubted authority, than the canvass which is, or at least used to be, carried on. It was a constant bargain and sale, the candidate promising places, the elector promising votes; and instances have been cited to us, with the names of persons and places,

of one place having been promised eight times to as many voters, each of whom promised, probably gave his vote, in succession; the place (a judicial one too, though of small amount) not having been vacant, but expected to be made so, by the removal of its holder. To the holder his removal would have been ruinous, and a timely interposition on the part of an honest magistrate saved him, disappointing all the corrupt voters—each of whom hoped to become *juge de paix* in reward of his having sold himself. It is one of the charges against the government recently overthrown, that the number of offices had been greatly increased with a view to augmenting the influence of the ministry in elections, and that for the same purpose an increased expenditure had been encouraged in the department of Public Works, sometimes enabling a deputy to gratify his constituents by orders for works given to obscure, unimportant places, sometimes gratifying the deputy himself by convenient roads drawn near his residence. The returns of the great increase in the expense of such departments as the Interior, the Revenue, and the Public Works certainly give some countenance to the statement. But we do not stop to examine it further, our object being to consider the Judicial abuses in their connection with this system.

In the Chamber of Deputies, consisting of about 450 (would that more numerous assemblies were unknown on either side of the Channel!) no fewer than 180 were placemen, or within 45 of the absolute majority. Of course others were so nearly connected with office by relationship, as to make them parts of the same body of functionaries. Therefore, to speak of the Chambers as an independent body, as a popular assembly, as a representative of the interests, the opinions, the feelings of the country, was the most gross abuse of terms. It was soon perceived, that the majority thus constituted were prepared to vote any thing and every thing. In the last session they had been satisfied with the scarcely credible course taken by the ministry of stifling inquiry into alleged corruption, and with the altogether incredible reason assigned for this course, namely, that the charge came from a disreputable quarter; as if any better reason

could be given for meeting it, and braving it, and for confidently expecting to confound it. This excuse and this reason entirely satisfied the base majority. But the Minister of Justice was fated to be damaged on this occasion, as on every other. He must needs come forward and declare, that he could not consent to an inquiry being instituted into the charge, because he was not satisfied that it was true! Does it not require even more than the evidence of our senses to make us believe, that any minister, but above all he who presided over the law and the judicature, could have exhibited the matchless boldness, which it required, to put forward such an argument against inquiry? But with M. Hebert and his reason the majority were completely satisfied. They desired no more trustworthy minister of justice; they asked no more sensible reason for his conduct.

Then let us for a moment consider, how this majority, consisting so much of public functionaries and their connections, were composed — that is, what kind of functionaries formed it. It is but too true, that above forty magistrates found their places in that body, now so universally despised, that above forty of these, whose nickname of the “Satisfaits,” derived from their shameless conduct, has stigmatised them as men ready to vote any thing their employers chose, were judges of the land, or procureurs-general, holding quasi-judicial places.

It must not be supposed that all the functionaries voted because they held offices from which they could be removed at pleasure. A very large number no doubt did; but the judges of whom we are now speaking did not. They were irremovable. The procureurs-general were removable. But the judges were retained in connection with the Government by the favours received, above all by the promotion from one judicial place to another much more valuable; and it is not denied that, in point of fact, these judicial functionaries, for the most part, voted among the “Satisfaits.” Can any thing more strikingly show the truth of the doctrines which we have never ceased to maintain, earnestly, but kindly and respectfully, to our neighbours, that, in order to render the administration of justice pure, it is absolutely

necessary to exclude judges from the elective Chamber, and thus to prevent them from mixing themselves with politics and party?

Let us only, for the present, assume, that all the charges arising out of the political capacity, in which French Judges are allowed, perhaps constrained, to act, are without foundation. Let it be admitted that their late adhesion to the party of the Government, thus forming a portion of the "Satisfaits," was conscientious, and in the mere discharge of their duty; nay, let us go further, and grant that no blame whatever rests upon the "Satisfaits" themselves as a body; still there remains the grievous evil, that the Judges become exposed to all the suspicions, and obnoxious to all the attacks, to suffer from which is the lot of political partisans; whereas the fair name of Judges ought not only to be kept pure, but preserved from even the taint of suspicion. At the present moment, of the millions who are condemning the late ministerial majority for their subserviency, the result in the public opinion of either stupidity or corruption, how few ever dream of separating the Judges from the rest of the body! With the whole of the "Satisfaits" they took their share of the late Government's very unavailing, perhaps not very respectful, gratitude, and they now equally share the country's unqualified reprobation and contempt.

The truth is, that there is no means but one of preventing a Judge from losing the public esteem and respect as a functionary set apart from ordinary pursuits to distribute justice, and raised above the storms of faction as well as the intrigues of courtiers. That one is to set him apart from ordinary pursuits, to raise him above the tempestuous regions disturbed by faction, and so preserve him from contact with the intrigues of courts. Once let the Judge be eligible as a popular representative, he becomes straightway a canvasser, exercising or excusing all the acts of his party; a partisan, subject to all the frailties of factious men; a political character, directing at least a portion of his thoughts to state discussions; but, above all, he stands in the eyes of the country as a politician and a partisan, and is no longer venerated as a Judge.

That in the present extraordinary position of France, when

an assembly is called together avowedly to frame a system of polity for the government of its affairs, all magistrates should be excluded, we by no means intend to affirm. Regarding this body as a "Constituent Assembly," and aware that, at least for the present, there can be no other in which the Judges might have seats, we may possibly admit the expediency of obtaining their help in the performance of the most difficult of human tasks, rendered by peculiar circumstances more than ever difficult on the present occasion. But we speak of the permanent constitution of the country; and we most anxiously hope that the government now to be formed will, as a canon of its judicial provisions, religiously exclude Judges from being deputies of the people.

Their exclusion from political functions, though it is the most important amendment of the French judicial system, is by no means the only one which appears to be absolutely necessary, in order to obtain any thing like a reasonable security against unfit judges. Excluding them from politics and party will tend greatly to secure their purity in the exercise of their high office; but to obtain the fittest Judges it is absolutely necessary that their numbers should be diminished and their salaries increased. There is not a greater mistake committed in the legal polity of France than the vast numbers of the courts and the consequent number of the Judges. There are 363 tribunals of "première instance," with from three to eight Judges in each; 27 Cours Royales, with 900 Judges, that of Paris having 50; the Court of Cassation with 24 Judges, and nearly 3000 Juges de Paix; in all nearly 400 Courts, with 2500 Judges, besides the Justices of Peace. The whole cost, however, of this enormous establishment is under 600,000*l.* a year. Deducting the 120,000*l.* which the Justices of Peace cost, it is considerably under half a million sterling; and this sum maintains 2500 magistrates of the higher order, being at the rate of 200*l.* a year for each. Some, however, have not much more than half this salary, and are, therefore, paid less than many menial servants in this country, and (clothes and board-wages included) less than some even in France. If you urge the impolicy of this system to a French lawyer, he will probably make answer,

that, notwithstanding the under payments, fit men are found to fill the places, because in France the love of holding office for the consideration which it bestows induces men to become Judges who have some fortune of their own. But can any thing be more evident than the consequences of this plan? Is it not plain that the Minister of Justice has his choice of Judges restricted to those who possess some private fortune, which a lawyer may easily have who has little law, and of which the best lawyer may easily happen to have none. Accordingly, no first-rate advocate can afford to quit his practice for a place on the bench: and hence, beside the necessity thus imposed on the Minister and on the community of having second or third rate men in judicial offices, there arises the unavoidable derangement to the due exercise of judicial functions from the superior weight and eminence of the practitioner to that of the Judge.

It requires no help of contrast to show the evils of this system. But it may be worth while to compare the French and English plans. In the United Kingdom we have about seventy Judges, including Masters in Chancery and Bankrupt and Insolvent Commissioners; or about 120, if we add the Scotch sheriffs and English Local Court Judges. Comparing the population of England with that of France, if England has 70 Judges, France should have about 80; but in France, instead of 80, there are 2500, or between 4000 or 5000, if Justices of Peace be included. But leaving them out of the account (and they exercise civil rather than criminal jurisdiction), and supposing each Court of Quarter Sessions to have a professional and paid chairman, and again reducing in the proportion of three to two on account of the different extents of the two countries, we should have all the civil and all the criminal business of the United Kingdom done by 160 Judges; when in France there are 2500, or, including Judges de Paix, more than twice as many. But the emoluments afford as great a contrast as the number of Judges. The English cost, reduced as above, is about 300,000*l.* for 160 Judges; the French only 500,000*l.* for 2500, or 700,000*l.* for above 5000, Justices of Peace included.

Not only is the under-payment fatal to the obtaining the best judicial body, but the great numbers make it impossible for the Bar to furnish the requisite supply of able men. Small as the numbers required with us are in comparison, no minister at the head of the law department ever found more than a sufficient number of candidates for judicial stations qualified satisfactorily to fill them. We abstain from entering upon other obvious topics connected with this subject, but we must on the present, as on the former head, express our anxious hope that, in new modelling their political system, our neighbours may carefully consider the necessity of lessening the number, and increasing the emoluments, of those to whom the most important functions in the state are intrusted.¹

It is impossible to close this article without warning the reader against supposing that our censures of the misgovernment to which the Republic succeeded, and which caused the revolution, imports any thing like an approval either of the new government, or the manner of establishing it. Nothing can be more clear than the right of resistance; a right to exercise which may become a nation's duty. On that right and on its exercise stands our own happy constitution; on that same right stood the government of 1830, now subverted. But there must be a grave cause to justify a revolt; and who can affect to think that the proceedings of the late government afforded the shadow of a justification to revolt? A change of ministry the people were entitled to demand; a new government they had no right whatever to ask. There is no one thing in the late proceedings so frightful as the shock which they gave to all confidence in existing governments. There is nothing which can be urged in defence of the revolt in February, that would not equally justify a revolt against whatever government may be put in the place of the present ephemeral and most imbecile shadow of a government.

Again, who can even hope to find, in all the pages of his-

¹ The Juge de Paix is seldom taken from the Bar: he is frequently a retired attorney. His salary is only from 30*l.* to 40*l.* a year.

tory which he may ransack, any precedent for such a usurpation as that of 24th of February? There was no form, no power, no choice, no shadow of title on which its existence could rest. Other usurpations have been effected—some by power of great talents—some by military genius—some by brute force—but this usurpation was the fruit of no such things. Seven or eight obscure names were proposed to a mob of 150 or 200 of the lowest mob rushing into the Chamber of the Deputies, and on their shouting “Aye,” these men were proclaimed the heads of a Republic! In all the history of human giddiness there never was so thoughtless, so unreflecting an act as this! Then the men so installed have governed the Paris people by means of the Paris mob—and because Paris has, from fear of bloodshed, and fire, and pillage, cowered before this mob, all France has cowered before cowering Paris—and the shameful, the disgraceful spectacle is exhibited to the pity and the scorn of mankind, of five and thirty millions of people, by their base fears, held in subjection to twenty or thirty thousand armed ruffians!

Nothing can be more disgusting than the flattery paid to this armed mob by the Press and the Provisional Government. Its conduct is termed sublime, and it is fawned upon by newspaper editors, now in their journals, now in their manifestos, as clement in victory, after being valiant in fight. Victory, when there was no fight! But of clemency, of sublime demeanour, take only two samples:—A hundred of the sublime people were burnt to death, lying dead drunk with the brandy of the Orleans’ Palace which they had plundered.—A dozen wounded soldiers, still alive, were thrown, at the Palais Royal conflagration, into the fire and burned in the flames, amidst the infernal shouts of their cannibal murderers! Yet these are the parties whom British senators have extolled in their ignorance, as well as French journals applauded in the agony of their fears! The acts of the Government, its plunder, its confiscations, its reckless follies, its seizing on the railways under the shallow and wretched pretence of improving their administration (as a highwayman improves the traveller’s use of his purse), its dash at the bank, its abnegation of permanent laws, though of a

Provisional Government, its base tricks to obtain a majority in the new assembly — and so to perpetuate its tyranny — above all, the shameful and notorious corruption of certain of its leading members, men bankrupt in fortune as in reputation — are only more to be despised than their power and authority. There is no government, nor any thing resembling a government, in France. Those who pretend to exercise the supreme power are absolutely and hopelessly impotent. They can only govern the mob by entreaty — only prevent insurrection by supplication — only keep the peace by begging.

When, therefore, we pointed out the faults of the late ministry, and the system overthrown, we had any inclination rather than to praise the dreadful anarchy by which it has been replaced.

ART. II. — ON THE LIABILITIES OF NAVAL AND MILITARY OFFICERS FOR PRIVATE WRONGS.

IN the exercise of professional duty by naval and military officers, private wrongs may frequently be occasioned to other officers, or to private individuals, whose legal remedies in such cases have not hitherto been systematically considered. As between officers themselves, the sweeping clauses of the articles of war are sufficient to bring most of such cases within the cognisance of a court-martial. But a court-martial has no power to award pecuniary damages for injurious conduct.¹ Its jurisdiction is criminal, and its judgments are penal. It may happen, too, that the common feeling of the service, to which the aggrieved or complaining party belongs, would, in many cases, render an application to such a tribunal utterly fruitless; as the general sentiment of the members of a particular profession or class of society, respecting a matter of

¹ Taunt. 78.

professional or corporate right or conduct, is often found to be at variance with the public law of the land.

Civil actions are therefore maintainable in the Superior Courts of Westminster against commissioned officers for exceeding their powers, or for exercising them in an oppressive, injurious, and improper manner, whether towards military persons or others. Numerous instances are accordingly to be found in the law reports of actions against governors of provinces, islands, and garrisons, military officers and officers of the navy, who have either abused their authority or mistaken the limits and extent of it.

Extreme difficulties, however, lie in the way of plaintiffs in actions of this nature, for no such action is maintainable for an injury, unless it be accompanied by malice or injustice: and the knowledge of this (says Mr. Baron Eyre), while it can never check the conduct of good men, may form a check on the bad.¹

Where an officer (says the same learned Judge) makes a slip in form, great latitude ought to be allowed; but for a corrupt abuse of authority none can be made.²

It will be convenient to consider the law upon this subject. 1st, As it applies to wrongs committed by officers towards persons under military authority; and, 2dly, As it applies to persons not subject to such authority.

I. Wrongs towards Persons under Military Authority.

A notion appears to have at one time extensively prevailed that an officer could have no remedy against ill treatment received from his superiors in the course of professional duty, except by bringing the offending party to a court-martial, and subjecting him to the penalties of the articles of war. This opinion, however, was quite unfounded in point of law; and such a state of things might often be productive of the worst consequences.

The question was distinctly raised in *Grant v. Shand*³,

Per Mr. Baron Eyre, 1 Term Reports, 539.

² Ibid.

³ Cited 4 Taunton's Reports, 85.

where an action was brought by an officer in the army against his superior officer for oppressive, insulting, and violent conduct. The plaintiff was directed to give a military order; and it appeared that he sent two persons, who failed. The defendant thereupon said to the plaintiff, "What a stupid person you are," and twice struck him: and although the circumstances occurred at Gibraltar, and in the actual execution of military service, it was held by the learned Judge at the trial that the action was maintainable; and a verdict was found for the plaintiff. An application was afterwards made to the Court of King's Bench to set aside the verdict; and Lord Mansfield, the Chief Justice, was very desirous to grant a new trial; but the Court, after argument, refused to disturb the verdict.

So also an action will lie for unjust treatment under the form of discipline, as in *Swinton v. Molloy*¹, where the defendant, who was captain of the Trident man-of-war, put the purser into confinement, kept him imprisoned for three days without inquiring into the case, and then released him on hearing his defence. The purser brought his action against the captain, Molloy, for this unlawful detention in custody; and upon the evidence, Lord Mansfield said, that such conduct on the part of the captain did not appear to have been a proper discharge of his duty, and therefore that his justification under the discipline of the navy had failed him.

In the foregoing case no want of uprightness was attributed to Captain Molloy, but the decision rested wholly on the circumstance of his having committed an injustice, although without a corrupt intention.

Cruelty and unnecessary severity, when wilfully committed, in the exercise of superior authority, are also good causes of action. Thus, in *Wall v. Macnamara*², the action was brought by the plaintiff, as captain in the African corps, against the defendant, Lieutenant-Governor and Military Commandant of Senegambia, for imprisoning the plaintiff for the space of nine months at Gambia, in Africa. The defence was a justification of the imprisonment under the Mutiny Act, for

¹ 1 Term Reports, 537.

² Ibid. 536.

disobedience of orders. At the trial it appeared that the imprisonment of Captain Wall¹, which was at first legal, namely, for leaving his post without leave from his superior officer, though in a bad state of health, was aggravated with many circumstances of cruelty, which were adverted to by Lord Mansfield, in the following extract from his charge to the jury:—

“It is admitted that the plaintiff was to blame in leaving his post. But there was no enemy, no mutiny, no danger. His health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But supposing it to have been the defendant’s duty to call the plaintiff to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, when there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court-martial? These circumstances, independent of the direct evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justification, had it even been within the powers delegated to the defendant by his commission.” The jury thereupon found a verdict for Captain Wall, with 1000*l.* damages.

The officers of an East India Company’s ship were, on the same principle, held liable to damages for compelling a military officer on his passage to India to submit to a ducking on crossing the line.

Lieutenant Man, of the East India Company’s service, sailed as a passenger on board the *Scaleby Castle*, Indiaman, from England to Bombay. On the approach of the ship to the equator, preparations were made for shaving and ducking the passengers.

Lieutenant Man, having had, from early life, a diseased or contracted arm, which, but for the peculiarly high testimo-

¹ It is remarkable that Captain Wall, the plaintiff in this action, was afterwards the celebrated Governor Wall, who was hanged at Tyburn in 1802, for the very offence of cruelty, which formed the foundation of his own action against Governor Macnamara.

nials which he produced, would have prevented him from entering the service at all, and being greatly averse to any exposure of this infirmity, gave notice, early on the day of the ceremonial, that he did not intend to submit to the operations in view, and offered money in abundance to the crew to purchase his exemption; but the money was refused, and violent threats were uttered against him; in consequence of which he retired for protection to his cabin, and there barricaded himself, by placing chests and trunks across the door, and closing the port to sea-ward. For many hours he continued unmolested in this state of darkness, suffering much from the heat and confinement; but in the latter part of the day his cabin was attacked by a large body of seamen, headed or encouraged by two of the ship's officers. Some of the assailants lowered themselves down the side of the ship, and forced open the cabin-port, and one sailor repeatedly made thrusts with a drawn cutlass into the cabin in various directions, with the intention of wounding or injuring its inmate; who, however, parried these attacks with his sword. The rest of the party effected an entrance into the cabin from the interior of the ship, attacked Lieutenant Man with drawn cutlasses, disarmed him of his sword, and, after using great violence to his person, dragged him on deck, and there forced him into a boat nearly full of filthy water. He was there stripped and tarred, and most roughly shaved or scraped with a jagged rusty iron hoop; and his infirm arm, in particular, was wantonly exposed and exhibited, and made the subject of contemptuous derision to all present throughout the proceedings, which were terminated by forcing his head under the water in the boat, and retaining him in that state till he was almost suffocated. The sores and bruises occasioned by this treatment confined the plaintiff to his bed under medical attendance for some days. For these outrages he brought an action on his arrival at Bombay against the officers who had been the ringleaders in the transaction, and also against some of the crew. He expressly disclaimed all desire to interfere with the ordinary sports and amusements of ship-board, when restricted within due bounds, and not employed as instruments of cruelty or

oppression, and rested his case, therefore, principally on the great insult which had been committed upon his feelings, by the heartless exposure of his personal infirmities. It appeared, also, that Lieut. Man was an officer of distinguished gallantry, and had signalised himself in his profession: so that his objection, in the first instance, to the ceremonial of crossing the line, was in nowise to be attributed to timidity or needless alarm. The Court severely condemned the conduct of the officers of the ship, and gave judgment against them with 400 rupees damages, which, with the expenses of the suit, amounted to a heavy fine; their pay and allowance (which were their only support) being very small.¹

An undue assumption of authority in matters not within the range of military discipline is also a good ground of action against a superior officer. This appears from the case of *Warden v. Bailey*², where the plaintiff was a permanent serjeant in the Bedford regiment of local militia, of which the defendant was the adjutant. In November, 1809, the colonel issued a regimental order for establishing an evening school at Bedford. He appointed the serjeant-major the master, and ordered all serjeants and corporals, including the plaintiff, to attend, and to pay eightpence a-week towards the expenses of the school. The plaintiff and some other of the scholars having afterwards omitted to attend, several were tried by court-martial and punished. The plaintiff, however, was only reprimanded, and he promised regular attendance in future. Shortly afterwards he was ordered to attend a drill on parade, when the defendant, who appears to have been a shopkeeper, shook his fist at the plaintiff, called him a rascal, and told him he deserved to be shot. The defendant then directed a serjeant to draw his sword, and hold it over the plaintiff's head, and, if he should stir, to run him through; and, by the defendant's direction, a corporal took off the plaintiff's sash and sword. The plaintiff was then conducted, by the defendant's order, to Bedford gaol, with directions that he should be locked up in solitary confinement, and kept on bread and water. He was thus impi-

¹ *Man v. Learmouth, Medland & Weobly's Remarkable Trials*, vol. i. p. 99.

² 4 Taunt. 67.

soned three days. He was then brought up before the colonel, and the defendant, and other officers of the regiment, and again remanded to the gaol. The plaintiff's health having been impaired by the continuance of this treatment for several weeks, he was afterwards conducted to his own house, and there kept a close prisoner until January, 1810, when he was escorted, by a file of corporals, from Bedford to Stilton, to be tried by court-martial for mutinous words spoken on parade at the time of his arrest, and for thereby exciting others to disobedience. He was tried accordingly, but liberated in March, 1810. Upon this he brought his action against the adjutant for the wrongful imprisonment: but Mr. Justice Grose, before whom the cause was tried, being of opinion that after the decision in *Sutton v. Johnston*¹, the question of the propriety of the arrest was not within the jurisdiction of the civil courts, the plaintiff was non-suited. The Court of Common Pleas, however, took a different view of the jurisdiction, and ordered a new trial. Sir James Mansfield, C. J.: "It might be very convenient that a military officer might be enabled to make the men under his command learn to read and write, — it might be very useful, but is not a part of military discipline. Then, further, there is a tax of 8*d.* a-week for learning to read and write. . . . A commanding officer of a regiment cannot impose that tax. . . . The subject cannot be taxed, even in the most indirect way, unless it originates in the Lower House of Parliament. We therefore think the rule must be absolute for a new trial." Mr. Justice Lawrence: "It is no part of military duty to attend a school, and learn to write and read. If writing is necessary to corporals and serjeants, the superior officers must select men who *can* write and read; and if they do not continue to do it well, they may be reduced to the ranks. Nor is it any part of military duty to pay for keeping a school light and warm: this very far exceeds the power of any colonel to order."

The common defence of officers, against whom actions of this nature are brought, is a justification of their conduct as

¹ 1 Term Reports, 493.

agreeable to the discipline of the service, and as contributory to the maintenance of that discipline. And there can be no doubt, that where the conduct brought into question is not an oppressive, malicious, or unreasonable exercise of power, and does not amount to an excess or abuse of authority, an action is wholly unsustainable.

This will appear from the following case, in which Midshipman Leonard, of H. M. S. Saturn, having disobeyed an order of the First Lieutenant (Shields) to go to the mast-head, and there remain for a certain time by way of punishment, Lieutenant Shields ordered him to be forcibly hoisted to the mast-head by a party of seamen. For this proceeding Leonard brought an action in the Court of Common Pleas against Lieutenant Shields for an assault; but the usage of the service as to the mast-heading of midshipmen for minor offences having been proved, the Chief Justice, Lord Loughborough, before whom the action was tried, ruled that the custom of the service was a justification of the lieutenant; and the jury found a verdict for him accordingly. This result was also warranted by the 36th naval article of war, which directs, that all crimes not capital, and not mentioned in the Act of Parliament, or for which no punishment is thereby prescribed, shall be punished "according to the laws in such cases used at sea."

On the other hand, an order clearly within the limits of an officer's authority, may be given by him under such circumstances, as to place him in great jeopardy, if he attempts to enforce obedience to it.

"It may not be fit (said Mr. Baron Eyre on an important occasion) that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head; but if the superior were to order him thither, knowing that from some bodily infirmity it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder." And one may observe in general, that there is a wide difference between indulging to situation a latitude touching the *extent* of power, and touching the

abuse of it. Cases may be put of situations so critical, that the power ought to be unbounded; but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity.”¹

The principles upon which the courts of law proceed in actions arising out of the abuse of military power, will receive further illustration from the language of Lord Mansfield in summing up the evidence to the jury in *Wall v. Macnamara*.² His Lordship thus expressed himself:—“In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, *how the heart stood?* and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment; or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of a justification the most technically regular, from

¹ 1 Term Reports, 503, 504. In reference to the same subject the following extract from the Annual Register of the year 1802, may be not improperly inserted here:—“Jan. 22. A court-martial was held at Portsmouth on board the *Gladiator*, on Captain Sir E. Hamilton, of H.M.S. *Trent* (who distinguished himself in the West Indies by the recapture of the *Hermione*), for sending the gunner and his crew up in the main rigging for three hours, when the gunner was taken down in a fainting fit through the severity of the cold. The charge being fully established, he was sentenced to be dismissed the service.” The officer’s authority was of course sufficient to support his order as a mere matter of military discipline, but the offence consisted in the excess of the punishment, for which an action at law clearly lay, if the injured parties had been advised so to proceed.

² 1 Term Reports, 536.

that punishment, which it is your province, and your duty, to inflict on so scandalous an abuse of public trust."

It is no legal objection to an action for the abuse of military authority, that the defendant has not been tried and convicted by a court-martial; for that argument holds in no case short of felony.¹

The infliction of an unjust or illegal sentence pronounced by a court-martial, is a good cause of action by the prisoner, against all or any of the member of the court; and all persons concerned in the execution of the sentence. Such a sentence, if it exceeds the authorised measure of punishment, being not merely invalid for the excess, but absolutely void altogether.

The most remarkable case on record of this kind is that of Lieutenant Frye of the Marines, who, after an unnecessary previous imprisonment for fourteen months, was brought to trial before a naval court-martial, at Port Royal, in the West Indies, and sentenced to be imprisoned for fifteen years, for disobedience of orders, in refusing to assist in the imprisonment of another officer, without an order in writing from the Captain of H. M. S. Oxford, on board of which Lieutenant Frye was serving. At the trial the written depositions of several illiterate blacks were improperly received in evidence against him, in lieu of their oral testimony, which might have been sifted by cross-examination; and the sentence pronounced was itself illegal for its excessiveness, the act 22 G. 2., which contains the naval articles of war, not allowing any imprisonment beyond the term of two years. On the return to England of Admiral Sir Chaloner Ogle, the president of the court-martial, Lieutenant Frye brought an action against him in the Court of Common Pleas, for his illegal conduct at the trial, when the jury, under the direction of the Lord Chief Justice Willes, gave a verdict for the plaintiff, with 1000*l.* damages. The Chief Justice at the same time informed Lieutenant Frye that he might have an action against all or any of the other members of his court-martial; and Lieut. Frye accordingly issued writs against Rear Admiral Mayne and Captain Renton, upon whom the same were served as

¹ Per Mr. Baron Eyre, 1 Term Reports, 539.

they were coming ashore at the conclusion of the proceedings of the day at another court-martial, of which they were acting members, for the trial of Vice-Admiral Lestock, for his conduct in a naval engagement with the French fleet off Toulon, in the early part of the same year.

This was deemed a great insult by the members of the sitting court-martial, who accordingly passed some resolutions or remonstrances in strong language, highly derogatory to the Chief Justice, which they forwarded to the Lords of the Admiralty, by whom the affair was reported to the King. His Majesty, through the Duke of Newcastle, signified to the Admiralty "his great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected; and the King highly disapproved of the behaviour of Lieut. Frye on the occasion." The Lord Chief Justice, as soon as he heard of the resolutions of the court-martial, ordered every member of it to be taken into custody, and was proceeding to uphold the dignity of his Court in a very decided manner, when the whole affair was terminated in Nov. 1746, by the members of the court-martial signing and sending to his Lordship a very ample written apology for their conduct. On the reception of this paper in the Court of Common Pleas, it was read aloud, and ordered to be registered among the records as "a memorial," (said the Lord Chief Justice) "to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." The proceedings and the apology were also published in the London Gazette of 15th Nov. 1746.¹

At a naval court-martial for the trial of Mr. Crawford, a midshipman of H. M. S. Emerald, for contempt and disobedience to the orders of his superior officer, Captain Knell, the court inadvertently found Mr. Crawford guilty only of having been *disorderly when a prisoner at large*, which formed *no part of the offence of which he was accused*; and he was reprimanded accordingly. Mr. Crawford thereupon brought an action against the captain for damages; and the learned

¹ Gent. Mag. 1746.

Judge who presided at the trial having made some severe animadversions on the illegality of the proceedings, the jury awarded heavy damages.¹

An action was brought against Colonel Bailey, colonel of the Middlesex Militia, for improperly flogging a private in the militia, and the jury gave 600*l.* damages.²

In *Moore v. Bastard*³ also, an action was brought against the president of a court-martial, for imprisoning the plaintiff upon an alleged charge of subornation of perjury. The jury gave 300*l.* damages.

An action was tried in 1763 before Mr. Baron Perrott, at the spring assizes for the county of Devon, against the officers of the Devon militia, for inflicting 1000 lashes on the plaintiff, in pursuance of their sentence pronounced against him at a court-martial held to try him upon a charge of mutiny; the only act proved being that the plaintiff had written a letter to the colonel of the regiment, which was not communicated to any one else, telling him that the men of the regiment were discontented. The jury gave 500*l.* or 600*l.* damages; and the case is quoted with approbation, by Mr. Justice Heath, who also intimated, that if the plaintiff had died under the punishment, all the members of the court-martial would have been liable to be hanged for murder.⁴

There was also another case of an action against Captain Touyn, a naval officer, in which the plaintiff recovered damages for the infliction of several dozen lashes without a court-martial, for a single offence, thereby exceeding the custom which had prevailed in the navy, that commanding officers might inflict one dozen lashes (called a starting) without a court-martial.⁵

The communication to the Judge Advocate General, by the president of a court-martial, of their opinion, in the form of a censure, respecting the prosecutor's charges, and his conduct in preferring them, is not a libel, and cannot be made the subject of an action at law.

This point was decided in 1806, in the case of *Jekyll*

¹ 2 Macarthur, 221. note.

² *Ibid.*

⁴ *Ibid.*

³ 4 Taunt. 70.

⁵ *Ibid.* 71.

*v. Moore.*¹ Captain Jekyll, of the 43d regiment, had preferred certain charges against Colonel Stewart of the same regiment, who was accordingly tried by a general court-martial, of which Sir John Moore was president. The judgment of the Court was, that "The Court do most fully and most honourably acquit him:" but to this sentence the following sentence was subjoined:—"The Court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer whose character has, during a long period of service, been so irreproachable as Colonel Stewart's; and the Court do unanimously declare that the conduct of Captain Jekyll, in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service." Captain Jekyll contended that the foregoing passage formed no part of the matter submitted to the judgment of the Court, and was, therefore, a libel on him. He accordingly brought his action for it in the Court of Common Pleas against Sir John Moore, but the whole Court was of opinion that no such action could be maintained.

Sir James Mansfield, C.J.: "In order to enable the court-martial to decide upon the charges submitted by the King, they must hear all the evidence, as well on the part of the prosecution as of the defence; and, after hearing both sides, are to declare their opinion whether there be any ground for the charges. If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious? It seems to me that the words complained of in this case form part of the judgment of acquittal, and consequently no action can be maintained upon it."

But it may be inferred from the foregoing decision, that a censure passed upon the prosecutor by a court-martial, with reference to a matter which is not the express subject of inquiry before such court-martial, would stand upon a

different footing, and probably be held actionable, as in Mr. Crawford's case.

No action, however, will lie for merely bringing a man to a court-martial, nor for the previous arrest or suspension; such acts being clearly within the limits of military authority, and exercisable, like all other such powers, in a discretionary manner, under the safeguards and at the risks provided by the Articles of War.

A commanding officer has, of necessity, a discretionary power to arrest, suspend, and bring to trial by court-martial, any person under his orders. But though this power is indispensable, and its limits cannot, like those of the power of punishment, be exceeded in point of extent, it may, nevertheless, be oppressively or improperly used; and therefore by the Articles of War, such conduct is of itself a distinct military offence, triable by a military jurisdiction. This was the opinion of the Judges of the Exchequer Chamber, in the case of *Sutton v. Johnstone*¹; and it seems also to be a just inference, from the judgment in the same case, that when an officer is expressly charged and found guilty before a court-martial of having improperly brought another to trial before a similar tribunal, an action is sustainable for the special damage resulting from the offence; but that until the officer procuring the first trial has been found guilty of improper conduct by a court-martial, a court of law cannot interfere; no civil tribunal being capable of appreciating with sufficient delicacy the circumstances which attend the exercise of military power, or of accurately discriminating the grounds of its application.

Want of probable cause for the accusation is the only basis on which an action for a malicious prosecution before a court-martial can rest; and when that is shown, malice will be inferred by the law. An acquittal, however, by the court-martial, of the party who brings the action, is not conclusive as to the want of probable cause. At the same time such an acquittal is an essential preliminary to the action, for though the accuser may have been actuated by the most clear and undisguised malice, yet if he substantiates his original charge

¹ 1 Term Reports, 549.

to the satisfaction of a court-martial, the accused has no *locus standi* in a civil court, even upon the fullest evidence of his prosecutor's malice, it being impossible to say that there was a want of probable cause, after a court-martial has adjudged that there was a positive cause. Innocence and uprightness of intention will, therefore, on the one hand, be no defence to an action of this nature, when there appears to have been a want of probable cause for the prosecution before the court-martial; while, on the other hand, the most malicious, or even corrupt intention, will not subject the accuser to a civil action, where he succeeds in establishing the criminal charge before the military tribunal.

A wrongful imprisonment, being, in the language of the law, a *tort*, savouring of crime, it is held that if two commit a tort, and the plaintiff recovers against one, he cannot recover against the other for the same tort.¹ This point deserves attention, because a different opinion was expressed in *Frye v. Ogle*²; and the rule was applied in *Warden v. Bailey*³, where another action was brought against the colonel of the Bedford militia for the same transaction, and the Court held that the imprisonment inflicted by the defendant, the adjutant, terminated on the plaintiff being brought up before the colonel on the third day, and being then remanded by him, so that the adjutant was held not liable for more than the first three days' imprisonment, and the colonel not liable except from the time of the commencement of the remand ordered by himself.

It should be observed, however, that no civil action will lie, in the first instance, against a commissioned officer for any exercise of military authority in the course of actual service in the field, in time of war. This was settled in the case of *Barwis v. Keppel*⁴, in which the plaintiff was a serjeant in the second battalion of the 1st regiment of foot-guards. The defendant, Colonel Keppel, was the second major of that battalion; and, in the absence of his superior officers, he had the command of it. In 1760, the battalion

¹ Per Mr. Justice Lawrence, 4 Taunt. 88.

² 2 Macarthur, 269. 4th ed.

³ *Supra*, p. 22.

⁴ 2 Wils. 314.

was ordered to Germany, under the command of the defendant, to form part of the King's forces serving under Prince Ferdinand. In September, 1761, the Prince, being in hourly expectation of a battle, issued an order that all deserters from the enemy should be immediately sent to head-quarters without a moment's delay. The plaintiff had full notice of this order; and three French deserters having surrendered to him, he detained them six hours, without bringing them to head-quarters, or reporting their arrival. For this neglect of orders the plaintiff was tried by court-martial, and sentenced to be suspended from his rank of serjeant for a month, and to do the duty, and receive the pay, of a private soldier during the same time. On the sentence being reported to Colonel Keppel, he did not confirm it, but made an order at the foot of the sentence in the following terms:—"But, as Serjeant Barwis could not be ignorant of the Duke's order concerning deserters, and Colonel Keppel thinking his neglect might have been attended with the utmost bad consequences, orders that he be broke, and that Corporal Billow be appointed serjeant in his room." This order was carried into execution, and the plaintiff served accordingly as a private until his battalion returned to England. Colonel Keppel, in 1762, was appointed to command an expedition to the Havannah; and, on his return to England, Barwis brought an action against him for maliciously and improperly reducing him (Barwis) to the ranks. A verdict was found for the plaintiff, with 70*l.* damages, subject to the opinion of the Court of Common Pleas upon the question whether the action was maintainable. The Court held, that as the whole matter took place abroad, and in the field, in open war, the defendant's conduct could not be tried in a Civil Court.

Per Curiam: "By the act of parliament to punish mutiny and desertion, the King's power to make articles of war is confined to his own dominions. When his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles of war, and therefore you cannot argue upon either of them, for they are both to be laid out of this case; and, *flagrante bello*, the common law has never interfered with the army. *Silent leges inter arma*. We think

(as at present advised) that we have no jurisdiction at all in this case; but if the plaintiff's counsel think proper to speak more fully to this matter, we are willing to hear him." The report contains the following memorandum:—"But plaintiff seeing the opinion of the Court against him, acquiesced, and the judgment was for the defendant, *ut audiui*."¹

It may be inferred, however, from some observations of the two Chief Justices, Lord Mansfield and Lord Loughborough, on a subsequent occasion², that if the conduct of Colonel Keppel had been previously condemned by a court-martial, an action at law would have been maintainable against him, although the transaction in question took place in the field, and in open war. But where a case relates solely to a discretionary power clearly vested by military usage in the officer whose conduct is impeached, the question as to any particular exercise of that authority is so purely military, that a court of common law will not assume an original jurisdiction over it.

Accordingly, a defence founded on a just exercise of military duty, in time of war, and on actual service, was successfully used in the case of *Sutton v. Johnstone*³, which came repeatedly before the Courts of Westminster, and gave rise to very elaborate considerations of the whole question concerning the due exercise of military authority under such circumstances. It appeared that on the 16th April, 1781, a squadron of men-of-war, under the command of Commodore George Johnstone, consisting of (among other ships) the *Isis*, Captain Evelyn Sutton, was surprised and attacked in Porto Praya Bay, in the island of St. Jago, by a French squadron, under Admiral de Suffrein. In his public letter, Commodore Johnstone accused Captain Sutton of disobedience of orders, and obstruction of the public service; and stated that he had placed him under an arrest. Captain Sutton continued under this arrest and suspension for upwards of two years, when he was brought to trial by a court-martial, on the 1st October, 1783, and honourably

¹ 2 Wils. 318.

² *Sutton v. Johnstone*, 1 Term Reports, 548.

³ 1 Term Reports, 548.

acquitted. Thereupon Captain Sutton brought an action against Commodore Johnstone, for a malicious prosecution; and this action became the subject of two trials; by the first of which Captain Sutton obtained a verdict of 5000*l.*, and by the next 6000*l.* damages. The cause afterwards came before the House of Lords, where, in May, 1787, it was decided that Captain Sutton had no right of action against Commodore Johnstone; and the judgment recovered in the Court below was reversed.

It being quite clear that Commodore Johnstone, as a commanding officer, had a discretionary right to arrest or suspend Captain Sutton, and had not exceeded his authority by so doing, the action was necessarily brought, not for the act itself, but to recover compensation for the special damages occasioned to Captain Sutton by a malicious arrest or suspension. The grounds, therefore, upon which Captain Sutton rested his claim for damages were, that it was the duty of Commodore Johnstone, after arresting and suspending him, not to have delayed to bring him to a court-martial; and that by means of the suspension, so long protracted, Captain Sutton lost the benefit of the prize-money taken by his ship in the interval. The Court of Exchequer Chamber, however, ruled that it was not incumbent on the Commodore to bring Captain Sutton to a court-martial; but as to Captain Sutton's right to his prize-money, the Court declined to pronounce any incidental opinion, as litigation respecting it was pending elsewhere between Captain Sutton and other parties. Commodore Johnstone's counsel, however, argued, in his defence, that on Captain Sutton's acquittal by the court-martial, his original rights in that respect would revive, and be secured to him; and probably the law is so.

But the main point in the case was the previous question, whether an action under such circumstances would lie at all? and notwithstanding Captain Sutton's acquittal by the court-martial, the Court of Exchequer Chamber and the House of Lords successively decided that an action would not lie. This shows that in the opinion of the highest court of the realm, Captain Sutton's acquittal by the court-martial was

not sufficient to establish a want of probable cause on the part of Commodore Johnstone.

There is no report of the reasons of the judgment delivered in the House of Lords: but with reference to the merits of the case, as affected by the act in respect of which Commodore Johnstone was sued having been a legal one in itself, the Court of Exchequer Chamber said: — “ The essential ground of this action is, that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the essential ground, because every other allegation may be implied from this: but this must be substantively and expressly proved — it cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied. From the most express malice, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt; or he may, from circumstances which he really believes, proceed upon apparent guilt: and in neither case is he liable to this kind of action. . . . The plaintiff (Captain Sutton) justified himself by a physical impossibility. Nothing less could be a justification. A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives — he must obey: nothing can excuse him but a physical impossibility. A forlorn hope is devoted — many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture. The question then tried by the court-martial was, whether Captain Sutton was justified in not obeying by physical impossibility? Now there cannot be a question more complicated. It involves the precise point of time; the state of the wind; the position of both fleets. It requires great skill in navigation. There is no question likely to create a greater variety of opinions. It is possible the court-martial sitting at Portsmouth, at a great distance of time, may have thought it was impossible to obey; and yet the whole squadron, who saw the action, might be of a different opinion. We use it only as a possible supposition: but we are warranted to make it by a matter of

fact, which, it seems, came out upon the trial of this cause. In the printed notes of my Lord Chief Baron's argument upon granting a new trial, his Lordship says that all the sea officers, those examined for the plaintiff as well as those who were examined for the defendant, swore they should have held themselves bound to obey the orders given if they had been in the situation in which the plaintiff was. Under all these circumstances, it being clear that the orders were given, heard, and understood; that, in fact, they were not obeyed; that by not being obeyed, the enemy were enabled the better to sail off; that the defence was an *impossibility* to obey — a most complicated point — under all these circumstances, we have no difficulty to give our opinion that in law the Commodore had a probable cause to bring the plaintiff to a fair and impartial trial." As to the objection for not speedily bringing Captain Sutton to trial, the Court said: — "The delay is charged to be contrary to the defendant's duty as Commander-in-Chief. There is no rule of the common or statute law applicable to this case. It is a mere military offence. It is the abuse of a military discretionary power; and the defendant has not been tried for it by a court-martial. A court of common law, in such a case, cannot assume an original jurisdiction. It is like the case of *Barwis v. Keppel*.¹ This objection we think fatal."

Upon the main and general question, whether an action lay for a groundless prosecution before a court-martial, the Court of Exchequer Chamber delivered judgment as follows: — "But the great and important question now brought into judgment for the first time is, whether such an action can lie? The occasion has often arisen at different periods of time, when men of the fleets, put upon their trials before a court-martial, have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression; yet, till this experiment, it never entered into any man's head that such an action as this could be brought. Consequently there is no usage, precedent, or authority in support of it. This case stands upon its own

¹ *Supra*, p. 31.

special ground. The wisdom of ages hath formed a sea military code, which in the last reign was collected and digested into an act of parliament. The great object of this code is, that the duty of every man in the fleet shall be prescribed and regulated by rules and ordinances adapted to sea military discipline; and that every man in the fleet, for any offence against his duty in that capacity or relation, shall be tried by a court-martial. If a man be charged with an offence against the articles, or, where the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial. A commander-in-chief has a discretionary power, by this military code, to arrest, suspend, and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But the military law hath foreseen that though it is necessary to give superiors great discretionary power, it may be abused to oppression; and therefore has provided for such abuse by the 33rd article. A commander who arrests, suspends, and puts a man upon his trial without a probable cause, is guilty within that article; but the same jurisdiction which tries the original charge must try the probable cause, which, in effect, is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction. The salvation of this country depends upon the discipline of the fleet: without discipline, they would be a rabble, dangerous only to their friends, and harmless to the enemy."

With respect to the exercise of military power by commanding officers in the execution of actual service, the following observations fell from the Court upon the same occasion: — "Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition

will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature? If this action is admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them. The relaxation and decay of discipline in the fleet has been severely felt. Upon an unsuccessful battle, there are mutual recriminations, mutual charges, and mutual trials. The whole fleet take sides with great animosity. Party prejudices mix. If every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief must be. The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal; and he who accused him unjustly is blasted for ever, and dismissed the service. These considerations induce us to turn against introducing this action. But there is no authority of any kind either way. . . . Supposing the action to lie, we think judgment ought to be given for the defendant [Commodore Johnstone].”

It may be concluded, therefore, from the foregoing case, that unless a court-martial shall first expressly decide that it was physically impossible for an officer to execute the orders delivered to him in the field or on actual duty, he has no right of action against his commanding officer for bringing him to a court-martial on a charge of disobedience to those orders, even though the court-martial may have acquitted him of misconduct.

But although questions regarding the use or abuse of military discipline can be discussed in the civil courts, the learned judges of those tribunals have deprecated the resort to such proceedings in ordinary circumstances; and in *Warden v. Bailey*¹, where the Court maintained their jurisdiction by ordering a new trial after the plaintiff had been nonsuited, the Chief Justice, Sir James Mansfield, said: “I must express the strongest wish that the cause will not be again

tried; for all disputes respecting the extent of military discipline are greatly to be deprecated, especially in time of war; they are of the worst consequence, and such as no good subject will wish to see discussed in a civil action; they ought only to be the subject of arrangement among military men."

In the case to which the foregoing observations gave rise, the learned Judges allowed, that "a considerable portion of unnecessary violence and indignity" had taken place.

By the Annual Mutiny Act it is provided, that actions brought for any thing done in pursuance of that act, must be commenced within six months; and defendants in such actions are so far protected, in the first instance, from wanton or unreasonable litigation, that if the plaintiff does not obtain a verdict, the Court is to allow treble costs to the defendant. Actions of this nature are also confined by the act to the superior Courts of Westminster, Dublin, and Edinburgh, where justice may be presumed to be administered with the greatest impartiality and precision.

II. *Wrongs towards Persons not under Military Authority.*

Injuries may be occasioned to persons not subject to military authority, by officers mistaking or exceeding their powers, or exercising them with malice, negligence or unskilfulness.

For acts of this kind a remedy lies only in the civil courts; the military tribunals, as already observed, having no power to grant pecuniary compensation by way of damages; and non-military persons having no *locus standi* as prosecutors before such courts, which are instituted solely for the maintenance of order and discipline among the armed forces.

In cases of the kind now under consideration, it is quite immaterial, whether the cause of action has arisen within the realm, or beyond the seas; though this proposition was not finally established until the year 1774, when the great case of *Fabrigas v. Mostyn*¹, was determined in the Court of

¹ Cowp. 161.

King's Bench, and put an end to all further question or doubt upon the subject. The plaintiff was a native of Minorca, of which island the defendant, General Mostyn, was governor. The general had by his own absolute authority imprisoned the plaintiff, and banished him from the island, without a trial. The defence was, that in the peculiar district of Minorca, where the offence occurred, no ordinary court or magistrate had jurisdiction. But the proof of this defence failed, and the jury gave the plaintiff 3000*l.* damages. The objection, however, was taken that the action did not lie, by reason of the foreign locality of the cause of it, and the point was twice argued at great length; but judgment was eventually pronounced against General Mostyn, in accordance with the verdict of the jury. It should be noticed also that, as General Mostyn happened to be a governor, his appointment gave him the character of a viceroy, so that *locally and during his government*, no civil or criminal action lay against him. On principles of public justice, therefore, it was necessary that a remedy should be had in England.

The undue assumption or mistaken exercise of authority by officers towards non-military persons, is a clear ground of action against them in the civil courts, even though there be no malice accompanying the transaction.

Thus in the reign of King William III. an action of trespass was brought against the defendant for billeting a dragoon upon the plaintiff, and forcing him to supply meat, drink, hay, and straw, for the soldier and his horse. The plaintiff kept merely a lodging-house at Epsom, and the Court of King's Bench held that he was not a person liable to have soldiers billeted upon him within the statute of 4 & 5 William & Mary, c. 13., so that the act of the defendant was a great invasion of the liberties of the subject, and the plaintiff had a verdict with damages.¹

Captain Gambier of the navy, under the orders of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who supplied the seamen of the fleet

¹ Parkhurst v. Foster, 1 Lord Raymond's Reports, 479.

with spirituous liquors. The act was done with a good intention on the part of the admiral, for the health of the sailors had been affected by frequenting these houses. Captain Gambier, on his return to England, incautiously brought home in his ship one of the sutlers whose houses had been thus demolished. The man would never otherwise have got to England; but on his arrival he was advised to bring an action against Captain Gambier. He did so, and recovered 1000*l.* damages. But as the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the action, and paid the damages and costs. This was a favourable case, unaccompanied by any malicious feeling, but the parties concerned did not attempt to disturb the verdict.¹

Admiral Sir Hugh Palliser was defendant in a similar action for destroying fishing-huts on the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing, and by such means obtained an advantage over the fishermen who came from England. It was a nice question upon the rights of the Canadians. But the admiral, on grounds of public policy, ordered the huts to be destroyed. An action was brought against him in England by one of the injured parties, and the case ended in arbitration. But, on the part of the admiral, it was never contended that the action did not lie by reason of the subject matter of it having occurred beyond the seas.²

“I remember (said Lord Mansfield) early in my time being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved that the tradesmen who followed the train were not liable to martial³ law, the court were of that opinion, and the jury found the defendant guilty of the

¹ Cowp. 180.

² Ibid. 181.

³ Military law was here evidently intended by the learned judge. When *martial* law is in force, every person, military or non-military, is subject to it.

trespass, as having had a share in the sentence, and gave 700*l.* damages.”¹

The following case, involving the same principle, occurred in India, and was there tried before the Supreme Court of Madras. Mr. H. Smith was agent, at Secunderabad, of a mercantile house at Madras, from whom he received a very handsome salary. He became indebted to a soldier of H. M. 33d regiment for some work intrusted to him, and a dispute having arisen between them as to the amount, this led to a violent altercation between Mr. Smith and the superintendent of the bazaar, acting under local military regulations. Lieut.-Colonel Gore thereupon sent a file of men to arrest the plaintiff, who was accordingly seized about six o'clock in the evening, and marched from his house through the streets of the cantonment, to the main guard at Secunderabad, where he was kept till twelve o'clock the next day. In consequence of these proceedings he brought an action against Colonel Gore for false imprisonment. Secunderabad was an open cantonment for a part of the subsidiary force serving in the territories of the Nizam, the force consisting partly of British and partly of native troops. It had barracks, and the men were hutted. It was also upon a field establishment, constantly ready for immediate service. The article of war then in force, being the 22d in the 11th section of the statute 27 Geo. 2., was thus intituled, “Of duties in quarters in garrison, and in the field;” and it enacted, “that all sutlers and retainers to a camp, and all persons whatsoever serving with forces *in the field*, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”²

Sir Thomas Strange, C. J.: “The question was, whether the troops, *being cantoned*, were in the state to which the cited articles of war applied. The Court thought they were not. It might have been a field force, being upon a field establishment, so as to be ready to move at the shortest notice. There might be great similarity in the arrangements

¹ Cowper's Reports, 175.

² 1 Sir Thomas Strange's Madras Reports, 435.

adopted for an army, whether in the field, or cantoned. A respectable witness, Brigade-Major Lyne, intimated as much. Still, so far as the Court could form a judgment upon a question of this nature, there seemed to be a difference between a camp and a cantonment, which appeared material. When in the field, not only the army, but its appendages must be under the immediate control of the officer commanding it, according to the rules and discipline of war. So situated, the sutler, who chose to follow the camp, identified himself in a manner with the soldier, for every purpose almost but that of fighting. The plaintiff called upon the Court to say, whether the force in question under the command of the defendant was at the time in the field. It seemed impossible to say that it was, without confounding ideas apparently very distinct. The defendant appeared to have acted under a mistake of his authority, for which he was liable to answer, as it had been productive of serious injury to the plaintiff." Judgment was therefore given against Col. Gore with fifty pagodas damages.

In the foregoing case reference was made to an action brought by Mr. Robert Bailie, an up-country trader, in the province of Bengal, against Major-General Robert Stewart, for an assault and false imprisonment. Mr. Bailie had resided within the cantonments at Cawnpore for many years, and dealt in European articles, which he principally disposed of to the military stationed there. In October, 1797, upon a complaint made to him by one of the people of his Zenanah, he tied up and very severely flogged one of his *chowkydars*.¹ For this act, Major-General Stewart ordered Mr. Bailie to be tried by court-martial; and as he acknowledged to have used no less than six switch whips in the flogging, alleging as his reason, that, as they were new whips, he was afraid of breaking them, and spoiling their sale, the court-martial sentenced him to five days' imprisonment, and to make an apology to the commanding officer. This sentence Gen. Stewart, though he did not approve of it, confirmed; and issued orders for

¹ Watchmen or guards.

Mr. Bailie to depart the camp as soon after his enlargement as possible. The Supreme Court of Calcutta held Mr. Bailie to be a sutler within the meaning of the articles of war, so as to render him amenable to military law. But in the above-mentioned action of *Smith v. Lieut.-Col. Gore*, the Chief Justice Sir T. Strange declined to be governed by the decision in General Stewart's case, as the note furnished to the Court did not clearly show whether or not the army was in the field when the transaction occurred.

In 1831, Mr. Glyn, a British merchant, was residing at Gibraltar, of which fortress General Sir Wm. Houston Bart. was Lieutenant-Governor acting as Governor. On the 3d of November in that year, between the hours of eleven and twelve in the day, Colonel Mair, the military secretary of Sir Wm. Houston, surrounded the plaintiff's premises with a detachment of troops, and searched a house immediately adjoining for the person of Torrijos, a Spanish general, who was suspected to be secreted there. During the search, which was unsuccessful, Mr. Glyn, on attempting to leave his house, was prevented from doing so by a sentinel placed at the door, who, presenting his fixed bayonet, compelled the plaintiff to retire within. Under these circumstances Mr. Glyn brought an action in the Court of Common Pleas against Sir Wm. Houston for assault and false imprisonment, committed by him, or under his orders; and the foregoing facts having been given in evidence, the jury, under the direction of Mr. Justice Erskine, found a verdict for Mr. Glyn, with 50*l.* damages.¹

Naval officers are also liable to damages by proceedings in the Court of Admiralty, for improperly capturing merchant-ships on suspicion of their being lawful prize.

Before the fruits of the prize can in any case be enjoyed by the captors, the vessel must be brought to adjudication and condemned by a Court of Admiralty as lawful prize. The captors must prove the justice of the capture; and if they succeed, the vessel is condemned accordingly; but if they fail in such proof, the vessel is restored to the owners

¹ *Glyn v. Houston*, 2 Manning & Grainger's Reports, 337.

by the Court of Admiralty, and the *same Court*, by its sentence of restitution, awards damages against the captors. This is now the settled course of proceeding.

The *actual* wrong-doer, however, is the only person who is responsible in the Court of Admiralty for injuries of seizure. This appears by the case¹ of the *Mentor*, an American ship, which, in the year 1783, on her voyage from Havannah to Philadelphia, was pursued by his Majesty's ships, *Centurion* and *Vulture* (part of Admiral Digby's squadron), then cruising off that river. The occurrence took place after the cessation of hostilities, but all parties were in complete ignorance of that fact; not only the persons on board the king's ships, but also the Americans, as well those on shore, as those on board the *Mentor*. In the pursuit, shots were fired on both sides; and it was alleged by the British that the *Mentor* was set on fire by her own crew, who took to the shore. For this wrongful seizure the owners of the vessel instituted proceedings in the Admiralty Court against Admiral Digby, who proved that, at the time of the capture he was thirty leagues from the scene of action, and totally ignorant of the whole proceedings, although the *Centurion* and the *Vulture* were under his general orders. The Court therefore exonerated the Admiral. Lord Stowell: "This is a proceeding for calling to adjudication, not the immediate alleged wrong-doer, but a person who was neither present at nor cognisant of the transaction, and who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority; for, as to particular orders applying to this transaction, it is not pretended that any were or could be given; he was only the Admiral on the general station, and the ships which committed the alleged outrage were under his general command, but at a great distance from him. Now, really, it appears to me, that it is the very first time that the attempt has been made, in a prize cause, to pass over the person from whom the alleged injury has been received, and to fix it on another person, on the ground of a

¹ 1 Robinson's Admiralty Reports, 179.

remote and consequential responsibility; and I call upon the experience of persons attending in this Court, to state whether there is an instance of that kind to be found in the annals of the Court. The actual wrong-doer is the man to answer in judgment; to him responsibility is attached in this Court. He may have other persons responsible over to him, and that responsibility may be enforced. As, for instance, if a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act. But it is the constant practice of this Court to have the actual wrong-doer the party before the Court, and every man must see the propriety of that practice; because, if the Court was once to open the door to complaints founded on a remote and consequential responsibility, where is it to stop?"

But though redress may be had in the Court of Admiralty, no action can be brought against a naval officer in a *Court of Law*, for merely seizing and detaining a vessel on suspicion of her being hostile prize.

"The inconvenience," says Mr. Justice Ashhurst, "of entertaining such causes would be intolerable; because every individual in the captured ship might have a separate action against every man in the crew of the vessel making the capture."

The point was conclusively decided in the case of *Le Caux v. Eden*¹, in which the defendant was captain of a letter of marque called the *Enterprise*, and, being on a cruise, fell in with and took as a prize a trader called the *Bee*, of Jersey, of which Fainton was master, Robine supercargo, and *Le Caux* second mate. After the capture, they and others were removed into the *Enterprise*, and brought to England, where the Court of Admiralty restored the ship, and condemned the captors in costs and damages. Thereupon Fainton, Robine, and *Le Caux*, not satisfied with this measure of justice, brought separate actions against *Eden* for trespass and false imprisonment. Fainton's action was first tried; and the Chief Justice, Lord Mansfield, said he thought the

¹ Douglas's Reports, 572.

proceeding a new attempt, which, if it succeeded, would destroy the British navy. If an action at law should lie by the owners and every man on board a ship taken as a prize, against the captor and every man on board his ship, no man would dare to take a ship. He thought a doubt made, and the pendency of such a question, especially if large damages were given, would have very bad effects, and obstruct the necessary operations of the sea service; and he advised the jury to find for the defendant, which they did. Robine's action came on next, when his counsel combated with great warmth the opinion which Lord Mansfield had given in Fainton's action. But Lord M. adhered to that opinion, which the jury again followed, and found a verdict for the defendant. It was then arranged that the facts in *Le Caux's* action should be turned into a special verdict, and argued before the full Court of King's Bench. This was done; and, after a solemn argument, the Court unanimously gave judgment in favour of Eden.

Nor will an action lie against a naval officer for the seizure and detention of a prize, even though he should afterwards dismiss the vessel without attempting to procure her condemnation by a Court of Admiralty; and although the grounds of detention were such as would not be causes of forfeiture, unless the vessel were British. This was the doctrine of the Court of Common Pleas in the case of *Faith v. Pearson*¹, where the defendant, who was commander of *H. M. S. Benbow*, sent an officer on board the British ship *John*, belonging to the plaintiff, on her voyage from Senegal to London; and, after various examinations of the ship and crew and papers, eventually detained her, and carried her to Barbadoes, on suspicion of being an American; Great Britain being then at war with the United States. After some time the captain of the *Benbow* liberated the master, crew, and vessel, without having instituted any proceedings against her in the Admiralty Court. An action having been brought against him for the seizure and detention of the vessel, the evidence showed clearly that the vessel was detained on

¹ 6 Taunton's Reports, 439.

suspicion of her being hostile property; and thereupon the Lord C. J. Gibbs held, upon the authority of *Le Caux v. Eden*¹, that there was no case to go to a jury. This opinion of the learned Chief Justice was afterwards sustained by the full Court, on an application for a new trial; and a new trial was refused accordingly.

It may be inferred, however, from the language of Mr. Justice Willes in the foregoing case of *Le Caux v. Eden*¹, that if any ill-treatment, not the necessary result or incident of the capture, should be inflicted by the captors on the officers or crew of the prize, there would be a good cause of action in a court of law for such an injury.

An unreasonable or malicious exercise of power will, in like manner, render an officer liable to an action for damages.

An instance of this nature occurred in the year 1783, when an action², was brought against General Murray, Governor of Minorca, for improperly suspending the Judge of the Vice-Admiralty Court of that island. The General had professed himself ready to restore the Judge on his making a particular apology; and, on reference to the home authorities, the King approved of the suspension, unless the Governor's terms were complied with. But although the legality of the suspension, as an act within the limits of General Murray's authority was not disputed, yet, on the grounds of his having unreasonably and improperly exercised that authority, and notwithstanding the king's approbation of his proceedings, damages to the amount of 5000*l.* were awarded against him by a jury; and, as Mr. Baron Eyre observes, it never occurred to any lawyer that there was any pretence for arresting the judgment.

But where an officer, in the conduct of operations against the enemy, takes steps which are undesignedly productive of injury to third persons, he is not answerable to them in a court of law for the consequences of his conduct. In 1822, an action for improperly harbouring some runaway slaves was brought by Mr. Forbes, a British merchant, in

¹ Douglas's Reports, 594.

² 1 Term Reports, 538.

the Spanish provinces of East and West Florida, against Vice-Admiral Sir Alexander Cochrane, as Commander-in-Chief, and Rear-Admiral Sir George Cockburn, as second in command, of H. M. ships and vessels on the North American station during the last American war in 1815.¹ It appeared that the British forces had taken possession of Cumberland Island, on the coast of Georgia; and that in February, 1815, H. M. S. Albion, which carried Sir George Cockburn's flag, and a squadron under his command, were lying off that island, where the head-quarters of the expedition were. Sir Alexander Cochrane himself was not off Georgia during the war, but was in correspondence with Sir George Cockburn while he was at Cumberland Island. A proclamation had been issued in 1814 by Sir Alexander Cochrane, as Commander-in-Chief, which Sir George Cockburn, when lying off the Chesapeake, distributed extensively at the Chesapeake and among the different ships, but none were distributed, by his command, to the southward of the Chesapeake, the southern extremity of which is full 400 miles distant from Cumberland Island. The proclamation stated that it had been represented to Sir A. Cochrane, "that many persons then resident in the United States had expressed a desire to withdraw therefrom, with a view of entering into his Majesty's service, or of being received as free settlers into some of his Majesty's colonies:" and it then notified, "that all those who might be disposed to emigrate from the United States, would, with their families, be received on board of his Majesty's ships or vessels of war, or at the military posts that might be established upon or near the coasts of the United States, when they would have the choice of either entering into his Majesty's sea or land forces, or of being sent, as free settlers, to the British possessions in North America or the West Indies, where they would meet with all due encouragement." One of these proclamations was seen on Amelia Island, about a mile from Cumberland Island, and about thirty miles from Mr. Forbes's plantation of San Pablo, where he had about one hundred negro slaves. In the night of the 23d February,

¹ Forbes v. Cochrane, 2 Barnewall and Cresswell's Reports, 448.

1815, a number of these slaves disappeared, and thirty-eight were found on the following day on board the *Terror* bomb, one of Sir George Cockburn's squadron at Cumberland Island, having been entered on the muster-books as refugees from St. John's. They all spoke English. On the following day Sir George Cockburn received a memorial from Mr. Forbes, requesting that the slaves might be delivered up to him as their lawful owner: and a correspondence also took place between the Spanish governor of Florida and Sir George Cockburn relative to the desertion of slaves from the Spanish settlements. Mr. Forbes likewise had an interview with Sir George Cockburn to claim the slaves, and was authorised by him to see the slaves and use any arguments or persuasions that he might think proper to induce them to return. Mr. Forbes accordingly saw the slaves: no restraint was put upon them, but they refused to leave the ship. Thereupon Mr. Forbes requested Sir George Cockburn to order them back to shore, which he declined to do, on the ground that they were free agents. The slaves were afterwards removed on board Sir George Cockburn's own ship, the *Albion*; from whence, by Sir Alexander Cochrane's order, they were, after the treaty of peace with the United States, carried to Bermuda, and there put on board his Majesty's ship *Ruby*; and, after remaining in that ship for twelve months, they were landed and employed in the royal dockyard at Bermuda. By the special terms of the treaty of peace with the United States, the refugee slaves of the subjects of that government were not to be restored. Mr. Forbes valued his slaves at 3800*l.*, and, under the foregoing circumstances, brought his action against the two admirals for damages to that amount. A verdict was taken, by consent, for 3800*l.*, subject to the opinion of the Court of King's Bench upon the merits of the whole case, which obviously turned upon the question, whether the refugees received by Sir George Cockburn into the *Albion* were slaves at the time of their first coming on board the *Terror*, or persons over whose movements a British officer could exercise any control; and as the view taken by the learned Judges of the Court of King's Bench of the duties of the gallant officers in the transaction under

consideration may be of practical utility on future occasions of a like nature, it seems desirable to make an extract from the eloquent judgment of the late Chief Justice Lord Wynford, then Mr. Justice Best. "The question," said his lordship, "is, were these persons slaves at the time when Sir George Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law; and therefore if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence, they must have been tried according to English laws. If any injury had been done to them, they would have had a remedy by applying to the laws of this country for redress. I think that Sir George Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavour to persuade the slaves to return, but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master, or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly-recovered right of freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, accord-

ing to our laws, be guilty of murder? So far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? It has been said that Sir George Cockburn might have sent them back. He certainly was not bound to receive them into his own ship in the first instance; but, having done so, he could no more have forced them back into slavery than he could have committed them to the deep. . . . Had the defendants detained these men on board their ships near the coast of England, a writ of *habeas corpus* would have set them at liberty. How then can an action be maintained against these gallant officers for doing that of their own accord which, by process of law in a British court of justice, they might have been compelled to do? Our judgment must be for the defendants."

With respect to a point much insisted on by the plaintiff Forbes, that as the admirals knew, or might have satisfied themselves, that the slaves belonged to him, they had become liable on that ground, according to the principle of the decision in *Blake v. Lanyon*¹, which was an action brought for harbouring an apprentice in England after notice, Mr. Justice Bayley made the following observations. "In *Blake v. Lanyon*, the defendant must have had full opportunity of making inquiry, and satisfying himself whether that which was asserted on the part of the plaintiff was true or not. There could be no difficulty in ascertaining with respect to a person in this kingdom whether he was the servant of A. B. or not, but a captain of an English man-of-war, engaged in foreign service, has not the same means of satisfying himself upon such a fact. It might have been wholly inconsistent with the duties which he had to perform in his character of a servant of the public, either to leave his ship, in order to make such inquiry himself, or to despatch persons in the public service, to inquire whether these slaves belonged to the plaintiff or not. Supposing that, during the absence of

any of the persons detached on such duty, an occurrence had happened which required the exertions of the whole crew, it would have been no excuse to the government of this country for him to say, that he had detached some of his crew to ascertain whether certain persons who had come to his ship, and had been claimed as slaves by several persons residing in different places, in fact belonged to them. It might happen, that every one of the slaves came from different places, and belonged to different owners, and it would have been necessary to make inquiries at each place. In this case the ship was within one mile of the shore; but it might have been fifty miles off. I am of opinion, that the defendants were bound to act *bonâ fide*. If it could be made out that they acted *malâ fide*, they would be liable to an action; but in order to support an action against a person who fills a public office, like that which the defendants in this case filled, it is essential to show that they acted *malâ fide*. . . . It appears to me that the character of *mala fides* does not attach upon either of the defendants in this case. . . . Their character, as public officers, placed them in a different situation from that in which other individuals would stand, and upon that ground I am of opinion that the plaintiff is not entitled to maintain this action.”¹

¹ In connection with this case, it may not be uninteresting to quote an extract from a letter of Lord St. Vincent to the Admiralty, in answer to a dispatch relative to the escape of slaves from Malta into ships of the Mediterranean fleet: — “From the days of the renowned Blake to this hour it has been the pride and glory of the officers of his majesty’s navy to give freedom to slaves wherever they carried the British flag, and God forbid that such a divine maxim should fade under me. It has been the practice in all the ports in the Mediterranean, time immemorial, on the approach of a British ship of war, for the governors to give notice to the owners of slaves to keep them in confinement until the departure of such ship. When I commanded the Alarm, two Tunisian slaves who leaped into her launch, when watering at the port in the Mole of Genoa, were forced out of the boat by the guard on the Mole, although one of them had wrapped the pendant round his waist. The moment the report was made to me, I demanded of the doge and senate that the slaves should have been brought on board immediately, with the part of the torn pendant which the slave carried off with him, the officer of the guard punished, and an apology made on the quarter-deck of the Alarm under the king’s colours, for the outrage offered to the rights of the British nation. After this was performed, I asked the slave

Negligence or unskilfulness in the exercise of an officer's duty may also be a cause of action for damages in respect of private injuries thus occasioned.

In 1844 a cause of damage was brought to a hearing in the High Court of Admiralty against a naval officer, on a charge of improperly occasioning a collision between Her Majesty's ship *Volcano*, a steam ship, under his command, and the brig *Helen*. It appeared that the *Helen*, a vessel of 166 tons, whilst in the prosecution of a voyage from Catania to Glasgow, was driven by stress of weather, and compelled to anchor in Mahomet's Bay on the coast of Spain; and that about noon on the next day the *Volcano*, with a mail and passengers from Malta, sought shelter in the same bay, and took up a berth about two cables' length to windward of the *Helen*. The *Volcano* came to anchor with her small bower anchor alone, and a chain cable an inch and a quarter thick. During the following night violent weather came on; the *Volcano* broke her anchor, and drifted athwart the hawse of the *Helen*, whereby two vessels were brought into collision, and the *Helen* was so severely damaged that she eventually sunk. At the time when the collision occurred the wind blew a perfect hurricane, and the sea was one mass of foam. Under these circumstances it was charged, that the mischief arose from the mismanagement of the *Volcano*: and the Trinity Masters, who assisted the Court on points of seamanship, being of opinion that the *Volcano* was to blame in the position she originally took up, and also in not letting out more cable, and in not dropping a second anchor, the learned Judge, Dr. Lushington, pronounced for the damage, and the commander of the *Volcano* became liable accordingly for the amount.¹

But where in time of war a naval officer, through misapprehension of the maritime law, and his own powers, unin-

who had wrapped the pendant round his body, what were his sensations when the guard tore him from the pendant staff; his reply was, that he felt no dread, for he knew that the touch of the royal colours gave him freedom." — *Tucker's Life of Lord St. Vincent*, vol. i. p. 446.

¹ *Volcano*, 2 W. Robinson's Admiralty Reports, 337.

tentionally misleads private parties who apply to him for guidance or direction, this is not a case of culpable negligence, and he is not responsible in damages for such an error, or its consequences.

This was decided in the case of the neutral ship *Courier*.¹ It appeared that she had sailed on a prohibited voyage, in contravention of the British Orders in Council of Jan. 7. 1807. The master, in the course of the voyage, having doubts as to its legality, applied to the commander of a British cruiser, who gave him permission to proceed. On the subsequent capture of the cruiser, this permission was pleaded to save the vessel from condemnation, but without effect. Sir William Scott, judge of the Admiralty: "It is not the mistaken exposition of this British officer that will alter the law of the case: the Court has allowed misinformation upon a point of fact to be a fair ground of indulgence: but upon a question of law the neutral is to look for other sources of instruction. In this case, indeed, the officer does not assume the right of interpreting the law; but he assumes a right which he is as little possessed of, that of superseding the order in council, by giving this vessel permission to go to the interdicted port. I do not say a case might not occur in which the Court would be disposed to hold an officer in His Majesty's service authorised to assume such a power, but it must be a case of necessity; as, for instance, where a ship is in absolute want of provisions, or is otherwise incapable of proceeding to an open port, and where the necessity alone, without such permission given, would be a sufficient justification. . . . I am very sorry that this conduct in the British officer has had the effect of misleading the master of the vessel: but, at all events, his owners have not been deceived: their's was the original purpose of sending the vessel to an interdicted port, and from which purpose *they* had never departed."

It has been pointed out in a former page, that where in a matter of pure military discretion, an officer has been acquitted

of culpability by a court-martial, such acquittal is a bar to any inquiry into the same matter before a civil court, at the instance of the party aggrieved. Such appears to be the rule in cases where both parties are subject to military authority in either of the services. But with respect to other cases, in which the aggrieved party is not subject to the military authority of the officer whose conduct is impeached, the rule seems to be otherwise; and the officer's acquittal by the military authorities will have no influence upon the decision of the civil court.

This is exemplified by the case of *The Volcano*, already cited. The collision had, previous to the proceedings in the Admiralty Court, been inquired into by the Lords Commissioners of the Admiralty, and also by the admiral of the station where the occurrence took place; and it was urged, that the subsequent promotion of Lieut. ——— showed, that in the opinion of competent judges no unseamanlike conduct was attributable to the commander of the *Volcano*. Upon this point Dr. Lushington thus addressed the Trinity Masters who were assisting the Court of Admiralty: — “ Gentlemen, it is my duty to inform you, that in this investigation we must be guided entirely by the facts disclosed in the evidence; and we must in no degree be influenced by any previous inquiry that may have been made, or the opinions that may have been formed by any individuals whatever. The cause comes before this Court with the approbation of the Lords Commissioners of the Admiralty, for an impartial decision; and it is obviously impossible that we can be in any manner guided by the consideration of circumstances that may have occurred elsewhere; still more is it impossible for us to allow the promotion of Lieut. ——— to have any influence upon our decision; that is a circumstance entirely out of this case, and dependent upon considerations with which we have nothing whatever to do.”¹

Officers being thus answerable at law for their own acts or defaults occurring in the course of professional duty, it remains to consider to what extent they are legally liable for

¹ *Volcano*, 2 W. Robinson's Admiralty Reports, 337.

wrongs or injuries occasioned by the conduct of their subordinate officers, in the execution of the services confided to them; and in this respect it will be seen that officers stand upon a different footing from that of ordinary persons.

By the general law, masters and employers of every kind are answerable for the acts or neglects of their servants, workmen, and agents; but this rule rests on the ground that private individuals have the power of appointing and selecting such agents or servants as they may think proper, and are consequently bound to employ only those who are of competent skill, diligence, and ability. But this principle has no application as between superior and subordinate officers in either service, for the obvious reason, that the former do not choose the latter; but each receives his own appointment from one common superior. The rule as to officers in both services is, that the actual wrongdoer alone is liable for the damages or injury resulting from his conduct; and the wrongdoer is he who issued the order or otherwise gave direct occasion to the act or omission which led to the mischief.

It is true that in *Boucher v. Noidstrom*¹, Mr. Justice Lawrence mentions the case of Captain Drake of the Russell man-of-war, who was held answerable for the act of one of the lieutenants, who had the command of the watch, in running down the London Indiaman, whilst Captain Drake himself was asleep in his cabin. "But," (says Lord Chief Justice Best), "when, or by whom that case was decided, I do not know: it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited."² It would appear, however, that Captain Drake had in fact given the orders on deck, for the particular tack to be made, in the course of which the London was run down, although he had gone below and remained there till the collision happened; but that ultimately Captain Drake was exonerated on the ground that the fault lay with the East Indiaman, and not with the man-of-war.³

The leading case, however, on this subject, is *Nicholson*

¹ 1 Taunton's Reports, 568.

² Hall v. Smith, 2 Bingham's Reports, 156.

³ Webb v. Drake, cited in 15 East's Reports, 387.

and another *v. Mounsey and Symes*.¹ The plaintiffs were the owners of the *Doris*, a merchantman, which was run down and sunk at sea by *H. M. S. Bonne Citoyenne*, a sloop of war, of which the defendant Mounsey was captain, and the defendant Symes first lieutenant. At the time the mischief happened, Lieutenant Symes had charge of the sloop as officer of the watch, and was on deck in the actual direction of the management and navigation of the vessel. Captain Mounsey was not on deck; nor was it his duty to be so at the time: and no negligence was personally imputable to him, unless from his situation as captain he was to be held responsible for his lieutenant. The point, as to Captain Mounsey's liability, was deemed, by the Court of King's Bench, to be of the greatest importance: and Lord Ellenborough, C. J., directed it to be argued in the deliberate form of a special case, with all the material facts admitted on both sides. The result was, that Captain Mounsey was held not liable for the misfortune, inasmuch as the lieutenant was put on board by the Admiralty; and Captain M. had no power either of appointing or dismissing his subordinate officers.

Lord Ellenborough pronounced judgment as follows:—
“Captain Mounsey is said to be liable for the damages awarded in this case, by considering him in the ordinary character of the master of the vessel, by means of which the injury was done to the plaintiff's property. But how was he master? He had no power of appointing the officers or crew on board; he had no power to appoint even himself to the station which he filled on board; he was no volunteer in that particular station merely by having entered originally into the naval service; but was compellable to take it, when appointed to it, and had no choice whether or not he would serve with the other persons on board, but was obliged to take such as he found there, and make the best of them. He had no power either of appointment or dismissal over them. . . . Captain Mounsey was a servant of his Majesty, stationed on board this ship to do his duty there, together with

¹ 15 East's Reports, 383.

others equally appointed and stationed there by the same authority to do their several duties. They had each their several duties to perform, only they were to be performed on board the same ship. . . . Here there was no personal interference of the captain with the act of the lieutenant, by which the damage was occasioned; both, indeed, were the servants of one common master, but there was no consent by the one to the act of the other, unless that can be inferred from the community of their services. This disposes of . . . the case of Captain Mounsey." Mr. Justice Grose added: "There can be no reason for making one man liable for the act of another whom he did not appoint or employ. If Captain Mounsey had ordered the other to do the act, it would have been a different question."

It may be useful here to mention, in reference to this subject, that vessels employed by the Admiralty as transports, and placed under the command of naval officers, are regarded by the law as mere private ships, of which the owners continue liable to the same responsibilities for collisions and other injuries of that sort, as if the entire command were vested in officers of their own selection.

The Countess of Cardigan¹, armed ship, was hired by the Commissioners of the Transport Board; and while engaged in that service she ran foul of a merchantman lying in the harbour of Sheerness. At the time of the collision the transport had on board an officer of the rank of commander in the navy, who had been placed there by the Crown, and also a King's pilot, who acted as such, and gave orders to the seamen accordingly. The master and crew were appointed and paid by the owners. In an action against the owners for the damage occasioned by the collision, they defended themselves on the ground that the complete control of the ship was in the hands of the government, whose officer had the command. But the Court of Common Pleas held that, as against all the rest of the world, the ship, though in the Transport Service, was to be considered as the ship of the owners; and that the

¹ *Fletcher v. Braddick*, 2 New Reports, 182.

Court could not inquire whether the injury had arisen from the negligence of the King's officer, or of the master and crew. The owners, therefore, were held liable for the damages.

It frequently happens in actions at law for private wrongs, that the defendant is the only person acquainted with some of the material facts, which it may be necessary to prove against him; and though in cases of mere debt or contract, a defendant is compellable by the Court of Chancery to make a disclosure of such facts as lie within his own knowledge, that rule does not apply to actions respecting private wrongs or injuries. An attempt, however, was made in *Sir William Houston's case*, by means of proceedings in the Court of Chancery, to compel that officer to produce certain military and other orders, reports, books, letters, and documents, from which the truth of the charge against him would appear. But the Master of the Rolls refused to make any order for that purpose.¹

Lord Langdale, M. R.: "It cannot be doubted that a governor of a colony, or any person whatsoever, however high his rank, acting in the service of the Crown, whether in this country or elsewhere, is answerable for any wrong he may commit to a party injured, by an action for damages, or criminally, if the justice of the case demand a criminal prosecution. I cannot concur in the observation made at the bar, that the injury of which the plaintiff complains is one of a trifling nature. To imprison a man in his own house—to surround his house with soldiers, who threaten his life if he attempt to quit it upon his lawful avocations—is a very considerable injury; and if this wrong has been done, the plaintiff has his remedy by the action which he has brought. On the other hand, no one is bound to make a discovery to criminate himself. . . . The whole object is to obtain a discovery of the alleged fact, that, by the order of the defendant, the plaintiff was illegally assaulted and imprisoned. If that fact be established, the defendant would be subject to penal consequences for his misconduct in that respect. In what way he would be so subject, whether by indictment, information,

impeachment, or, if necessary, by a bill of pains and penalties, is immaterial. It is sufficient that he would be subject to penal consequences." Motion refused.

But officers misdeameaning themselves in high commands on foreign stations are not left to be sued in a civil action for damages simply by the party aggrieved. Delinquencies might thus escape exposure. By the stat. 42 Geo. 3. c. 85., every person employed by the Crown in any civil or *military* station, office, or capacity, and committing any crime, offence, or misdemeanour, under colour or in the exercise of his office, may be prosecuted criminally by an information exhibited by the Attorney-General, or upon an indictment found by a grand jury in the ordinary way, and is liable, upon conviction, to the ordinary penalties for the like offence when committed in England, besides being liable, at the discretion of the Crown, or of the Court of King's Bench, to be adjudged incapable of serving again in any military or public employment whatever. It is conceived that the word *military* in this act is applicable, technically, to naval officers as well as to those who are ordinarily styled military.

ART. III.—SEVERANCE OF LAW AND EQUITY.

The Anomalous Condition of English Jurisprudence. By CHARLES FRANCIS TROWER, Barrister-at-Law, late Fellow of Exeter College, Oxford. J. Hatchard and Son.

THINGS are indeed changed since the time when Lord Kenyon could say, with respect to our double system of Law and Equity, "I find that in these Courts, proceeding by different rules, a certain combined system of jurisprudence has been framed most beneficial to the people of this country, and which I hope I may be indulged in supposing has never yet been equalled in any other country on earth."¹ We have before us a most striking instance of this. Here is a pamphlet written by a gentleman who is known to have been a very successful competitor for distinctions in the most conservative university in the British dominions, and who cannot therefore be supposed to be animated with any bitter or indiscriminate hostility to old and existing institutions, who tells us (p. 1.), that "our ordinary Courts necessarily become, if they only apply to practice their principles of decision, *instruments of injustice*;" and who expresses his conviction of the state of general feeling towards law and lawyers in the following terms:—

"The mighty fabric of our Municipal Law does not stand well with the affections and homage of the people. I do not say that it does not constrain obedience, or that it fails generally in being an efficient terror to evil doers; but does it command the love and commend itself to the reason of the peaceful, and loyal, and dutiful subject? Else why such expressions as the following, which are proverbial: 'The glorious uncertainty of the law;' 'the quibbles of the law;' 'the delays of Chancery,' and the like? Nay, does it not throw, like an evil blight, a kind of moral halo round those who are concerned in its administration, suffocating their better parts, and eclipsing their natural graces? Can there be any concealment of the fact, that lawyers carry something forbidding about with them in the estimation of their fellow men? Is not the term '*Lawyer*' a term of any thing but respect through-

¹ *Baerman v. Radenius*, 7 Term Reports, 667.

out the length and breadth of the land? From the duke down to the peasant, is he not an acknowledged nuisance — a permitted, because inevitable, but an unwelcome, incumbrance? Ask the honest yeoman, as he stalks his broad acres, what he thinks of him. He shrugs his shoulders at the very name, and prays to be delivered from him. Hear what the village tradesman says, as he stands at his shop-door, and sees the man of law hurrying with restless step down the street, and you may read in the language of his eye a volume of antipathy. Ask that shabby old man, the wreck of better days, how he has come to this, and he will tell you, with a truthfulness of manner which cannot be mistaken, the ‘lawyers have ruined me.’ Or dwell for a few moments on yonder widow’s piteous tale, and you will learn that she has spent her last farthing ‘*in law*!’ Or, to take higher flights of general opinion, does not the squire look upon his lawyer as a perpetual rent-charge on his estate? Even Parliament, so prone to listen patiently to, and judge leniently of, the feeblest attempts of oratory, thins its benches as *honourable and learned members* catch the Speaker’s eye.” (pp. 65—67.)

This is strong language for a lawyer; but is it not something more than mere rhetoric? Is it not a true, though forcible, statement of public feeling? Mr. Trower thinks this feeling justified by facts; and it is the object of this pamphlet to point out what he considers to be the crying evil, the monster grievance, of our present system; and to prove that it is artificial, and therefore capable of being remedied. In men’s present disposition, now that the retreat of the tide of change which accompanied the Reform Bill has left them vacillating between conservatism and innovation, it almost takes away their breath to hear of any fundamental alteration. They are well disposed for “pin-scratches of reform,” as our author calls them; but shudder at the plunge required by such a revolution as he proposes. This is no less than the abolition of all distinction between law and equity. Through his reasons for this we propose shortly to follow him, stating at the same time that our analysis cannot do justice to his work. It is, indeed, too short to require analysis: it is close enough in its reasoning, and accurate enough in its statement of facts, to satisfy the lawyer; whilst its breadth of view and popular style must

render it attractive to the general reader. It certainly has one of the greatest of merits, — that of not being dull.

Having quoted some well known dicta, to the effect that our Courts of Common Law so departed from their original principles as to become instruments of injustice, Mr. Trower proceeds to inquire what is the cause of this fearful “anomaly of judicial degeneracy,” and to prove, which he does in a very triumphant manner, that the principles upon which the common law is based are moral principles of the deepest and widest character, and capable, therefore, of expansion and application to all human dealings; that the common law ought therefore, if true to its principles, to administer all justice which law is capable of administering, and would, consequently, in that case, leave no room for any independent system of equity.

And here a parenthetical exception may be taken to one of Mr. Trower’s statements, which does not, however, at all affect his general argument. He seems to think that the influence of Christianity has very considerably modified the principles on which the law of property is based, and has rendered the administration of that law more just. This is a wide subject; but we may just remark that though Christianity has, no doubt, made men more just, by giving them nobler and deeper views of the nature of duty and religious obligation, it has operated, as far as positive law is concerned, rather upon personal relations than upon rights of property; that *δικαιοσύνη* was, if any other, a virtue well understood by heathen antiquity: and that as a matter of experience the Roman law concerning property was more just than that of semi-christianised feudal Europe.

Having proved that law is an anomaly, unless based upon justice, Mr. Trower proceeds to show that equity, in its common acceptation, is either something which infinitely transcends the sphere of all human laws and judicatures, or that it is the true foundation of every species of law; and that, in its technical sense, as applied to the practice of the Court of Chancery, it is nothing more than a system of positive law.

The following is his own forcible language, when speaking

of equity in the sense of the spirit in which all human laws should be conceived and enacted : —

“ Truly, it is an idle fancy to talk or think of justice, — which it should be the aim of all human laws to attain to, — as an attribute distinct from equity, or equity from justice. Could we (giving the greatest latitude of theory) conceive a system of laws constructed upon the condition that they should be equitable without being just, or just without being equitable? Clearly, no. And yet the text-books of the profession, by not dwelling on the *artificial nature* of the distinction between the principles that govern our Courts of Equity and Common Law, lend perpetual countenance to the idea, now pretty generally received, that those principles necessarily occupy separate departments in the great work of all legislation. But is not the determination of right and wrong, the limitation of that which is lawful and that which is unlawful, and the discernment of truth from falsehood the common office and province of both alike? Ought not the soundness of this or that doctrine concerning the social duties of man, to be ascertained alike in both, by one and the same test, namely, by its agreement with the law of nature, speaking to us by our reason, in our conscience, through the universal assent of mankind?” (p. 13.)

And, again, speaking of Equity in its technical sense, he says : —

“ For the truth is, that Equity, in this sense, consists of its *established rules and fixed precepts*, as much as a Court of Common Law — that it is as rigorous in the enforcement of all technicalities, and as much the slave of antiquity, — that it will not stir hand or foot to help a suitor, unless he bring himself within the pale of those boundaries which it has arbitrarily prescribed for itself to work in, and can cite some precedent that the aid he solicits has been granted to others before him. ‘In all such cases of positive law,’ says Blackstone (that is, cases which are *without* the letter of the Common Law, but *within* the necessity of some redress), ‘the Courts of Equity must say, with Gratian, *Hoc quidam perquam durum est, sed ita lex scripta est.*’ And, again, ‘The system of the Courts of Equity is a laboured, connected system, governed by established rules, and *bound down* by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection.’ And certainly, if the latter be, as it unquestionably is, a correct representation of the system of our modern Equity Jurisprudence, the picture which

Aristotle first, and Grotius after him, drew of Equity, can find no counterpart now-a-days in the administrative functions of the English Chancery." (pp. 15, 16.)

It might have been thought that Mr. Trower had laboured this point at too great length, if it were not for the extreme and inexplicable confusion of thought which exists, as he says, in almost all our law books, and which illustrates, in the most striking manner, the want of original, accurate, and philosophical investigation amongst us. Fonblanque, with all his ability and learning, begins his Notes on "Ballow's Treatise," with quotations from Puffendorff and Grotius, on the subject of the Aristotelian *ἐπιείκεια*, which may have some bearing upon such an interference with ordinary courts of justice, as has frequently been exercised by despotic powers, or upon the power of the Crown in England to pardon convicted criminals, but which has nothing whatever to do with the system that forms the subject of his book. Blackstone, though he steers quite clear of Scylla, by distinguishing natural equity from positive Chancery law, falls into Charybdis when he traces the whole distinction between law and equity to difference in their forms and modes of proceeding. "*Equity mitigates the rigour of the law*," is the watchword of the former class of theorists; "*Æquitas sequitur legem*," is the motto of the latter: maxims, the one of which was probably at one time true, and the other adopted in order to disarm the fury of common law opponents; but both of which are now half true and half false, and do little but mislead. Equity does indeed *mitigate the rigour of the law* in some instances, but it does so by substituting a positive just rule for a positive unjust one; occasionally, too, it must be admitted, by substituting a positive unjust rule for a positive just one: but how far it is from carrying to its full extent any such principle, Blackstone has convincingly shown. Again, equity does indeed *follow the law* in some cases; as, for instance, in the devolution of trust estates, the administration of legal assets, and the recognition of legal rights as a ground on which to grant injunctions; and sometimes has fallen into very great absurdities in so doing; as, for instance, in the doctrine of tacking mortgages, and in

compelling an equitable tenant in tail to go through the form of a legal recovery : but, to say that this is the leading doctrine of a Court, which looks upon a mortgage as a mere pledge ; which recognises the right of a married woman to hold property ; which has introduced a new element for the avoiding of contracts, misnamed equitable fraud ; which regards equality as equity in the payment of debts ; which looks to the nature of the transaction rather than to the form of the instrument, and despises the formality of a seal ; which compels persons to give evidence against themselves ; and which, lastly, prefers prevention to cure, and specific relief to pecuniary compensation—is a flagrant absurdity, which, in Blackstone, probably owes its rise to his veneration for the common law, but which ought never to be heard of more. Even Story, in his work on Equity Jurisprudence, though he spends a whole chapter in proving how erroneous have been the views held on this subject, adopts, as the motto on his title-page, Bacon's extremely inadequate maxim,—“Chancery is ordained to supply the law, not to subvert the law ;” and, by his indiscriminate use and approval of very inaccurate quotations¹, and, by the terms of his arguments in favour of the separation of the two jurisdictions², does much to prevent his readers from perceiving the really accurate view he entertained on the subject.³ It seems to have been reserved for Mr. Spence to rescue this subject from the confusion that has hitherto surrounded it, by throwing overboard all attempt to draw a general scientific distinction between law and equity, and by tracing, as a matter of simple historical fact, the origin of the different branches of the jurisdiction now exercised by the latter. It is not, perhaps, possible to describe equity more definitely, than by saying that it is an independent system of positive law, derived chiefly from Roman example, differing from the common law in the manner in which the law of one age and time generally differs

¹ See especially ss. 13. 18. 32, 33.

² ss. 33. 35. 37.

³ It is a great pity that this learned and really large-minded lawyer did not, instead of compiling so many voluminous books, spend his time and labour in thoroughly condensing and arranging one or two. The result would have been far more valuable.

from that of another; supporting, extending, altering, correcting, supplanting, or subverting common law in points on which the two systems differ; but doing so within a sphere determined by rule and precedent, the limits and character of which must be learnt in the same manner as the limits and character of every independent system of positive law,—by study of its individual parts.

Mr. Trower next goes on to point out the principal cause of the rise of this double system. He shows that in early times it did not exist; that the reign of Edward III. may be looked upon as the starting point of the independent judicature; and that its institution was owing mainly to the prevalence of the system of conveying to uses: and he inveighs most bitterly against the narrow-mindedness and technicality, "the intellectual sin," as he calls it, of the common law judges, who would not extend their rules so as to meet the growing wants of society, and who would not take cognizance of the duty which he who was intrusted with property owed to him for whose benefit he held it. In much of this censure Mr. Trower is clearly right. In an age characterised by intellectual subtlety, our lawyers were the subtlest of the subtle; fine distinctions and elaborate arguments were, no doubt, more attractive to them than considerations founded on a sense of justice and the convenience of mankind. But Mr. Trower has, we think, been a little hard upon them. He has omitted to notice influences to which they were exposed, and for yielding to which they ought not to be branded as narrow-minded and technical. It is to their ignoring the right of cestuique use that he, in common with all writers, mainly attributes the first introduction of an independent jurisdiction in Chancery. Uses, according to him (pp. 17—23.), were first imported in the reign of Edward III.; but, according to Mr. Spence (vol. i. p. 439.), at a much earlier period, probably, indeed, soon after the time of the universal introduction of feudal restrictions on alienation. Mr. Spence seems also to think that in very early times the Ecclesiastical Courts took cognizance of breaches of trust. (pp. 440. 443.)

Now, at the time of the Conquest, and for a long time afterwards, feudalism was no obsolete technicality; no, nor

yet simply a burdensome and inconvenient tyranny. The personal relations of chief and clansman, of lord and vassal, had their real beauty and meaning. And the laws of property which arose out of, and preserved, and protected these relations, were neither completely tyrannical, nor altogether foolish and barbarous. Again, the spirit of resistance to the anti-national power of Rome and the clergy, and the desire of preventing them from appropriating the greater part of the property of kingdoms, are motives, which in these days few Englishmen will despise. It cannot, moreover, be doubted, that feoffments to uses were often employed for purposes which we should, even now, call fraudulent. On the other hand, there was great and continually increasing right on the part of the many who felt the burden of the feudal relation, without deriving from it corresponding benefits, and who struggled, consciously or unconsciously, for the principle now so largely developed, that the interests of all are best furthered by giving unfettered rights of dealing and alienation to each. That the clergy also had something to say for themselves we must also admit; and we cannot wonder that men who considered that they were doing God service by giving their property to the Church, tried all expedients to do so. If there were, then, as all history shows, two opposite feelings in the nation; the one feudal, allying itself with national feeling, and the dread of priestly influence; the other commercial, associated with greater civilisation and with religious influences, what wonder if our common law judges should throw themselves, with the zeal of partisans, into the arms of the former; refuse to accept from the chief authors of the latter any portion, however good, of their system of jurisprudence; and treat uses as an impious abomination, to be discountenanced, as complaints in the mouth of a person tainted with personal misconduct now are in equity, by a refusal to entertain any claim arising out of them. On this ground, therefore, they stand, in a great measure, justified. Nor is it easy to see how they could have adopted the step suggested by Mr. Trower as the proper one,—viz. of treating the cestuique use as the real holder of the land. If there is one doctrine of feudalism which has been more favoured than

another by our law, which has left deeper traces on our system of property, it is that of conveyance by livery of seisin. Four years have not quite elapsed since its last vestiges were effaced. Nor was it a mere technicality: the principle of requiring notorious and well-evidenced transfers of property is one recognised by the Roman Law¹; by our own statutes of Inrolments and of Frauds; and by the present demand for a Public Registry. How, then, could a judge, to whom this doctrine was dear as the apple of his eye, transfer to the cestuique use, who had nothing but a word, or a piece of parchment, to prove his title, the property which had been vested in the feoffee to uses by means of all the solemn requisite legal ceremonies? And if he were not to have so transferred it, but still to have acknowledged the right of cestuique use, what was he to do with all the feudal consequences of tenure? Were they to be annexed to the estate of the feoffee to uses only? If so, feudal doctrines were overthrown. Or the estate of the cestuique use? If so, there would still have been the absurdity of feudal tenure existing in one man, and the consequences of that tenure in another; not to mention, though this would have been a consequence little cared for by those judges, that the use must in that case have lost its flexibility and beneficial qualities, or feudal restrictions on alienation must have been in a great measure abolished, as they were by the statute of Uses. No; on the hypothesis that uses were impious, fraudulent, illegal, and anti-national, and the doctrines of the common law sufficient for the growing wants of society, the judges adopted a wise course in discouraging their creation by refusing to notice them. But their hypothesis was false, and the Court of Chancery became necessary.

All, however, that we have said on this point is only intended to protect our old lawyers,—for whom, Heaven knows, we have no special veneration,—from unmerited abuse; in short, to give the devil his due. We entirely agree with Mr. Trower in considering the distinction between the right and the possession, the equitable and the legal estate, as one totally indefensible on principle, and unintelligible, except

¹ 1 Spence, 33.

on historical grounds; and we also quite agree with him in thinking that since the spirit of feudalism is extinct, and we have other methods of guarding against fraud, and also, partial and anomalous as they are, of preventing alienations in mortmain, almost all the reasons which ever existed for supporting such a distinction are gone; and that it is, therefore, now, in nine cases out of ten, an absurd, useless, and injurious, but deep rooted, anomaly.

We have next an account of the attempt of the legislature, by means of the statute of Uses, to put an end to this anomaly, and of the utterly inexplicable construction by which the judges soon managed to render that attempt futile. The praise given to the authors of this statute (pp. 26, 27.), is a little extravagant. They happen to have left us a very long preamble to tell of their intentions; and we find that, amongst many objects which any civilised society would join in desiring, they had others which were far behind the customs and civilisation of the times in which they lived,—*e. g.* the restoration of all those feudal rights and restrictions which had long grown antiquated and burdensome, and the destruction of all powers of disposing of land by will; in fact, the entire restitution of the feudal Common Law. Whether they contemplated the improvement which was actually effected in the law through the application of equitable doctrines to legal estates, and the invention of the complicated machinery of springing uses, is doubtful: they could hardly have overlooked its probability: but it cannot have been a principal point with them, as it is not noticed in the preamble. In one other point, a small and unimportant one, Mr. Trower has carried his criticism upon the construction of this statute too far; he tells us (p. 33.), that, in holding that the statute operates, where one person is seized in fee to the use of another for a term of years, and in at the same time holding that it does not, where one person is entitled for years to the use of another for years, the judges were guilty of an "inconsistency scarcely conceivable." But this is not so. The judges wished, apparently, to restrain the operation of the statute within the narrowest possible limits: and they decided, arguing from the use of the word "seized," that it could only operate

where the feoffee to uses had a freehold estate. This was very technical: but it was not inconsistent with holding that it could operate, although the *use* was only to continue for a term of years, so long as the feoffee to uses had or was seized of his freehold.

With these two exceptions, Mr. Trower's exposition of the statute and its construction is most admirable, as a clear and popular, and at the same time accurate, explanation of this most obscure and extraordinary, but most important, phenomenon in our system of jurisprudence.

We gladly pass to what we consider the cream of the work,—the illustrations of the anomalies and really serious practical evils, which arise from the severance of Law and Equity. The first class of cases taken embraces those in which a suitor, in order to prevent a piece of gross injustice and illegality being committed by Courts of Law, is obliged to come into Equity, and obtain some relief against them there, generally in the form of an injunction, to stop their proceedings. *Their proceedings*, we say it knowingly and purposely; for the formal fiction that injunctions interfere with the suitor only, and not with the Court, is almost too absurd to deserve notice. As our author says, —

“It is really astonishing that there should be found those who, in their zeal to make out a consistency and co-ordinateness of operation between the two tribunals, have distinguished between an order directing the party enjoined not to proceed in the ordinary courts, and one directing those courts themselves not to entertain the matter; and who urge, that an inhibition to the suppliant is no interference with the independence and majesty of the tribunal which he supplicates! For is it not, in substance, equally a check to the power and influence of any court, to prevent suitors having access to it, as it would be to prevent that court, in so many words, from listening to the demands of those suitors?” (p. 42.)

Only let us picture the Chief Justice seated in full Court, with all the dignity of the Bench. Imagine the plaintiff and the defendant at law engaged before him in a deadly struggle. The contest is nearly over; the judge has made up his mind; Coke is clear upon the subject, and the plaintiff is on the point of getting judgment; when, like a *Deus*

ex Machinâ, in steps the retainer of Equity, armed with the omnipotent injunction, whisks the plaintiff off the stage before the face of my lord, and so puts an end to the litigation; whereupon my lord chief justice puts his hands into his pockets, allows the defendant, the legal defaulter, to march triumphantly out of court, and observes, with an air of self-complacent dignity, "Yes, Madam Equity, snatch my suitors from under my nose; put a stop to all my proceedings; subvert all my rules for administering justice, if you please; but, so long as you keep your hands off my person, the dignity of the Bench and the integrity of the Law I administer are preserved inviolate." Such is a fair picture of the manner in which some persons still represent to themselves the interference of Equity. It is really time that this, amongst other fictions, should be fairly looked in the face. Though in itself only ludicrous, it has the effect of blinding men to serious anomalies.

But, to return to Mr. Trower's illustrations. The first case given is that of an injunction obtained in Equity to prevent a defendant in an action at law from unjustly setting up a defence there in the shape of an outstanding term. After a clear explanation of this circuitous process, follow these just remarks:—

"Now, mark the amazing absurdity of this state of things. A. (the plaintiff), (and the cases have been of frequent occurrence), could not *proffer his claim originally in Equity*. His remedy, his only acknowledged remedy, was *at Law*. He was compelled to resort to these, *because that was the only tribunal appointed to try the facts in dispute* between the parties; and yet it withheld the very means indispensable for a fair investigation of the subject. Nay, if not controlled by Equity, it would have decided in the very teeth of the facts, and decreed the land to C. (the defendant). The suitor, baffled and buffeted from court to court, is at first denied a full hearing in that one in which he is obliged to commence his suit, and, finally, by the help of an extrinsic Tribunal, forces the original court to hear the case, *contrary to its own rules, and to retract its previous denial!*" (p. 39.)

He then gives the case of an injunction obtained against a creditor after a decree in an administration suit, and proceeds:—

"Again, a Court of Law will give a verdict for the plaintiff in an action on a Bill of Exchange, or other negotiable security, although it has been obtained from the defendant under circumstances so grossly inequitable, as to render it impossible, even according to our perverted system of jurisprudence, that the transaction should ultimately stand. But *Law* will not prohibit the negotiation of the Bill. *Law* will not direct its cancellation. Rather, *Law* will enforce its payment. What, then, shall the defendant do? He hies him from the regions of special pleading to the haunts of the Equity draughtsman; leaves the chrysanthemum terraces of the Temple for the joyless garden of New Square; exchanges an attitude of defence for a posture of defiance, and is metamorphosed into a plaintiff in Equity. The plot now thickens around him; he stands pledged to a double lawsuit. And certainly, during the interval which must elapse before his 'bill is on the file,' and his 'motion brought on,' he will continue in no very enviable state of suspense; and even when he goes on his way rejoicing, with the order for an injunction in his pocket, there remains a sorer battle for him yet to wage, when his opponent shall have roused himself to his full strength, and the effort to 'dissolve' comes on. But we will suppose that he is victorious throughout; that the whole expense of the Equity campaign has to be defrayed by his adversary, and that 'at the hearing' he has even made his injunction 'perpetual.'

"Yet let us pause to consider his career. He has run great hazards; he has had miraculous escapes; he has been put to gratuitous suffering; a single false step would have ruined him; he has had a twofold litigation; he has had to traverse the quicksands of equity, *in addition* to the quagmires of law. And all for what? For what, indeed, but to satisfy the senseless requirements of a legal tyranny, and to add one more to the train of unwilling victims, whose examples will be hereafter wrested into as many reasons against the annihilation of these abuses?" (pp. 42—44.)

Other instances of this unnatural recourse to a second court in order to prohibit the primary and proper court from perpetrating illegalities, are exposed with similar force and clearness: but we have not room for them: we will only observe, that the hardship inflicted by the necessity of filing a bill for discovery to assist an attack or defence at law, is not coloured as strongly as it might be, since the unfortunate plaintiff in equity is, whether he is ultimately successful or

not, — though the justice of his original claim, and of every step he takes to enforce it, is fully admitted by the result in both courts,—inevitably obliged to pay all the costs of his examination of the defendant in Equity.

This part of the subject may be concluded with the observation with which Mr. Trower concludes it, fully justified as it is by the facts he has adduced:—

“ *The only effect of the present state of things*—and this is most worthy of observation—*is to make the road to justice more circuitous, and to wilfully interpose a temporary barrier in the way of its suitors ; it does not debar them from obtaining that indemnity which, according to the Common Law view of their rights, they ought not to obtain, but only renders the mode of their obtaining it more intricate, more tedious, and more costly.*” (p. 48.)

The next class of illustrations consists of those “ in which the suitor comes originally before Equity for redress, but is by her remitted to Law, not because she denies his right to any redress at all,—far from it,—nor because she cannot take cognizance of the subject matter of the particular claim without transgressing her principles, but because it is one to which the jurisdiction of the ordinary courts happens to extend, and which, therefore, she hands over to them for adjudication.” The first cases noticed in this class are those in which the whole relief is given in one or other of the two courts, but it is doubtful in which. Hence it often happens that the unfortunate suitor finds out, too late, that he has chosen the wrong court, has to pay all the costs of the first suit, and then commence fresh proceedings in the other. Mr. Trower gives, as an instance, the notorious case of *Mozley v. Alston*, better known as the battle of the Broad and Narrow Gauges. We may add the very striking one of *Knight v. Marquis of Waterford* (a tithe suit), which, after wending its weary way up to the House of Lords *vid* equity, was then sent back, to start again in the ordinary tribunals, and is now even as wearily remounting to the same place *vid* common law. No wonder that such cases are numerous, considering the extraordinary and anomalous character of equity jurisprudence, and considering, also, the dim twilight half knowledge of common law rules, in which equity practitioners dwell, and the still

greater darkness of common lawyers with regard to Chancery, which they seem to regard as a gloomy, shoreless limbo, thronged with despairing suitors, who lie overwhelmed with arbitrary decisions, huge masses of paper, and interminable bills of costs.

Our author next proceeds to those cases in which equity entertains the suit in part, but sends the parties to law to have some question determined which would, if it stood alone, be within the jurisdiction of the ordinary tribunals. Such are all cases in which equity gives additional protection to a right, which is, for some purposes, acknowledged at law; *e. g.* where an injunction is granted to restrain breaches of a patent or copyright. Such, too, are cases in which an issue is directed in order to ascertain facts. On this point let us again hear Mr. Trower:—

“ Sitting, that is to say, as a court of justice, to weigh well the actions of mankind; nay, professing to take into the scale their very motives, armed, too, as she boasts, with an omnipotent authority to search into the hidden reasons of things; and, practically employing that authority, a vast number of daily instances, to test facts, detect pretences, and sever truth from fiction. Equity now refuses her aid, because questions of fact are before her! At one time, she lends her capricious ear to the fullest extent to the unravelling of doubtful claims; at another, she deafens it to the cases of the most palpable necessities! Can she, with any show of reason, allege that she abandons a case to law, because debateable masses of fact can be best decided there? Equity not competent to deal with facts! Why, every month of the year, hundreds of thousands of facts are travelling on in their luggage vans, through the dark rooms of those slow waggoners, the Chancery Masters—her own officers and offspring—by her especial order and command!!!” (pp. 57, 58.)

Such, too, are cases which might have afforded Mr. Trower fine scope for satire, in which the equity judge, who has all his life been conversant with real property law, who, perhaps, during his early professional career practised as a conveyancer, sends questions of real property law to be argued before men whose attention has seldom, if ever, been called to the subject; whose knowledge is often confined to what they acquired during a six months' sojourn in the chambers of a

conveyancer some half century ago, or in the course of the two or three real property cases argued by them at the bar, for which they were probably crammed by some one possessed of a competent quantity of that extremely abstruse and technical branch of legal learning. The absurdity of the practice is heightened by the fact that the Equity Judge does not consider their opinions as binding, and is not compelled by any positive rule to obtain and follow their conclusions, but looks on them as authorities which are to guide him only if he does not differ widely from them. So that a suitor is sent, by a tribunal which is competent, to one which is incompetent, and then sent back to the former for a final decision, and all for no better reason than because the question turns upon what is called *the legal right*.

The next class of cases mentioned is intended as an illustration of the defaults of equity in carrying out her own principles: it consists of those in which equity refuses to enforce the specific performance of an agreement for the sale of things which are not specified, or for the execution of some undertaken work (pp. 59—63.). Here Mr. Trower has surely gone too far. Courts of equity have, in respect of this branch of their jurisdiction, enough to answer for in the vagaries into which they have been led on the subject of compensation in cases of misdescription, and on that of part performance, without being charged with defaults of which they really are not guilty. The fundamental principle on which they act is this,—that pecuniary compensation is often an insufficient remedy, because the thing bargained for may have, in the purchaser's eyes, some peculiar worth beyond the average market price in money, and, therefore, if possible, equity gives him the specific thing. This applies to every specific thing contracted for, and to that extent the jurisdiction is now, when possible, carried. But if the parties' contract is only for things answering some general description, —*e. g.* 100 tons of iron or 100 acres of land,—without pointing out any particular 100 tons of iron or any particular 100 acres of land, the thing itself does not exist in the view of the parties at the time of the contract, and it becomes, therefore, impossible to ascribe to the purchaser any value for it except

a pecuniary one. Pecuniary compensation, to the fullest extent, the common law gives him, in respect both of his purchase money, if paid, and of the excess of value of the market price at the time when the goods ought to have been delivered, over the contract price: in other words, it gives him the amount of money which would, at the time of the breach of contract, enable him to buy the goods in the market. To do more than this; to allow him to lie by till the goods reach their highest price in the market, and then require the vendor to buy them for him, or to give him the money to buy them, would be to enable him to commit great injustice.

The other cases Mr. Trower mentions as instances of this default are those of building contracts and the like. In respect of these, there are certainly early dicta of a loose general character, which narrow the jurisdiction unnecessarily; but the courts seem disposed, now, to enforce performance whenever the specification is sufficiently accurate to render it possible¹; and beyond this we can scarcely wish them to attempt to go.

Two elements of evil arising from the severance of law and equity there are, which Mr. Trower has not quite sufficiently exposed. The first he has touched on (p. 49.):—

“The reader must be informed, that there is an immense mass of cases, daily coming before the Equity Courts, in which the real merits of the contending parties are never touched; those cases, I mean, which have not yet reached the stage in which the rights of the *litigants come to be discussed*; cases, in which the whole argument turns upon preliminary points, matters of pleading, questions as to whether this or that court has jurisdiction in the suit, and so forth;—cases, of which, it may be said, the rind and bark have not yet been stripped, and which are, at an enormous cost, at intervals of weeks or months, dragging their slow lengths along, without involving any thing more at each successive hearing, than the discussion of dry details of practice. Now, it is not here for an instant pretended, that cases can proceed in any court without a certain observance of prescribed technicalities; every system has, and ever will have, its formularies; and no code of law can be conceived which shall not be encrusted with a ceremonial fence-

¹ *Storer v. G. W. R. Co.*, 2 Y. & C. C. 48.; see also 4 Hare, 506.

work ; but what is insisted on is this, *that any thing which procrastinates and complicates an arrival at the merits is vicious ;* and that any abridgment, which can with safety be made of the purely formal part of law, as contrasted with its substance and vitality, ought to be made ; and that the separate administration of law and equity multiplies, beyond all telling, that procrastination and complexity, and is its chiefest cause." (p. 49.)

We believe this is, perhaps, the strongest point in Mr. Trower's case. In "Chitty's Equity Index," the heads "Practice" and "Pleading" comprise considerably more than one-fourth of the whole book ; and it is only necessary to look at any practising lawyers' book-shelves to see how they groan under the weight of books which do not pretend to teach any thing but the dry forms and methods of the proceedings of the courts. Considering the disgusting nature of this drudgery, the bad and narrowing effect it has upon the intellect, the opening it gives to men who have no motive but the love of money, and no idea of legal science beyond the vulgarest technical logic and the most contemptible hair-splitting ; considering, too, that these huge edifices of formulæ are cemented with the heart's blood of the suitor, every true lover of law and justice must most earnestly grieve over whatever has the effect of increasing their number and variety. That such is the effect of the separate existence of law and equity, and, we may add, of the Ecclesiastical Courts, is, no doubt, the case ; not to the extent, perhaps, of doubling or trebling them, but certainly of making them far more bulky and numerous than would have been the case if there had been any unity in our system of law and the practice of our judges.

The second point to which we wished to call attention, and which Mr. Trower has not noticed, is the difference caused in fundamental opinion as to what is legally right and wrong on subjects, of which both tribunals profess to have complete cognizance, and in which they are said to decide on the same principles, and to do justice concurrently and co-extensively. This evil, it is true, must always be felt to some extent, wherever there is more than one Court to deal with similar matters. But our Common Law Courts are

kept to some degree of uniformity by the Exchequer Chamber; our Vice-Chancellors by the Chancellor. Law and Equity are subject to no such controlling power: for the House of Lords sits in different capacities on the respective subjects; and is, besides, too expensive a tribunal for frequent resort. Illustrations of this evil are abundant; but we must be content with two or three.

It is constantly laid down that the rules of construction, both for instruments and for statutes, is the same in equity and at law; but when we examine the cases, we are rather puzzled to ascertain in what this identity consists. For instance, a contract for the sale of a particular property ought, one would think, to be construed as a contract for the sale of that property and no other; and so it is, *at law*; but let the vendor file a bill for specific performance, instead of bringing an action for damages, and the purchaser will find himself obliged to take a materially different property, with a pecuniary compensation for the difference. "Would have done so," we ought to say, for the Courts have been lately more rational. Again, Courts of Equity appear to consider themselves, equally with Courts of Law, subject to the Statute of Frauds. That statute prohibits, in tolerably plain terms, any legal proceedings upon certain verbal and informal contracts. Courts of Law accordingly admit of none; but Courts of Equity, by help of the doctrine of part performance, the real principle of which there is no possibility of discovering, encourage a very considerable number. To turn the table upon Courts of Law: common persons naturally imagine that when they sell any thing, — shares, for instance, in a railway company, — the advantages, as well as the liabilities, such as the payment of calls, thenceforth fall to the lot of the purchaser; and that this is a condition arising by implication and without express words from the ordinary relation of vendor and purchaser. This view of the case is accordingly upheld in equity, and acted upon in a suit for specific performance of the legal formalities necessary to complete the transaction.¹ But should the vendor have been

¹ *Shaw v. Fisher*, 12 Jur. 152.

ill-advised enough to complete these formalities without a suit in equity, or should he for any other reason not wish to complete them, he crosses Westminster Hall, chooses, unfortunately, to bring his action in the Exchequer, and is there met by Baron Parke with the comforting legal doctrine, that he might have saved himself by express words, or by compelling the purchaser, contrary to all custom, to complete the purchase at once; but that, having only done what men of business ordinarily do in such transactions, he is without remedy.¹ Perhaps, however, the best illustration is to be taken from the decisions which have been made on the subjects of fraud and misrepresentation. Putting aside what is miscalled Equitable Fraud, it is always said, that Courts of Equity act on precisely the same principles as Courts of Law. Now what is the true state of the case? In equity every misrepresentation, including under that name suppression as well as statement, by which another person is reasonably induced to act, whether made with intent to deceive or not, is a ground for giving or refusing relief as the case may be. This is a broad principle, consonant to men's ordinary sense of justice, and of easy practical application by a Court of Justice. Now, then, let us see what is done at law. Would that this were as easy to state as the rule in equity! The Learned Barons of the Exchequer having chosen to lay down the rule, *that there must be actual moral fraud to give a remedy*, have, as might be expected from the adoption of so inadequate and so undiscoverable a test, got themselves into such a quagmire of doubts and difficulties, such a swarm of distinctions between tacit suppressions and actual misstatements, — between statements which the maker believes to be true, statements he knows to be false, and statements about which he knows nothing, — between falsehood committed through the medium of an agent, and falsehood committed by the principal only, — between lies direct, and lies collateral, — that it must be beyond even their powers to deduce from them any rule on which men can act. One or two points, however, they have decided which are worthy of

¹ *Humble v. Langston*, 7 M. & W. 517.

notice. One is, that there is no fraud, and consequently no remedy, in the case of any misrepresentation which the person making it is not proved to have known to be false.¹ Another, that an agent is not to be presumed to know what his principal knows.² So that, under these two precious rules, a man who wishes to commit ever so great a fraud, has only to employ an agent, and he may do it with impunity! These bad decisions have obviously arisen from the tendency of the leading mind in the Court of Exchequer to lay down the strictest possible rules on all subjects. This was the very thing which originally drove men into equity, and it is therefore not inappropriate in this place to notice one or two other flagrant cases in which this tendency has been displayed. The same Court has decided³ that since no warranty is implied on the sale of a specific chattel, and since the sale of land is always specific, a purchaser of land has never a remedy for any defect or fault, however clear the object of the purchase, however clear that the seller must have known of the defect, however certain that the purchaser could not by any reasonable efforts or inquiries have discovered it. Again, Baron Parke has laid it down as a strict rule⁴, that no agent or manager has power to borrow money on behalf of his principals for the purpose of the business, unless it is in the usual course of the business to do so, however stringent the necessity of the particular case, and however certain the ruin of the whole concern for the want of money; and Mr. Justice Maule's very sensible ruling in the same case, to the effect that the power of the agent depended upon the question of necessity or no necessity, which it was for the jury to decide, was accordingly overruled. Lastly, in the notorious cases of *Reynell v. Lewis*, and *Wyld v. Hopkins*⁵, the Court assumed to itself the office of a jury, decided what acts do, and what

¹ *Cornfoot v. Fowke*, 6 M. & W. 358. *Moens v. Hayworth*, 10 M. & W. 147.

² *Cornfoot v. Fowke*, *sup.* See moreover on this subject *Collins v. Evans*, 5 Q. B. 820. *Taylor v. Ashton*, 11 M. & W. 401. *Ormrod v. Huth*, 14 M. & W. 662. *Rawlings v. Bell*, 9 Jur. 973. *Atkinson v. Pocock*, 12 Jur. 60. B. Alderson's Judgment in *Smout v. Ilbery*, 10 M. & W. 1. contains some better sense, which is inconsistent with later decisions.

³ *Sutton v. Temple*, 12 M. & W. 52. *Hart v. Windsor*, 12 M. & W. 68.

⁴ *Hawtayne v. Bourne*, 7 W. & M. 595.

⁵ 15 M. & M. 517.

do not, amount to the appointment of an agent by a provisional committee man; and, in so doing, not only made, according to the opinion of most persons, a bad decision in the particular case, but stereotyped that decision as a permanent rule of law. This last case, with which, for want of space only, we must conclude, is very characteristic of the Court of Exchequer. Rules, no doubt, there must be. But adherence to rule irrespective of the reason on which the rule is founded, inability to perceive the limits to every rule which opposite rules and principles create, inattention to the wants and habits of society, and a disposition to fix every thing, and leave nothing to be done by judge or jury in individual cases, are the very vices which have so often rendered law odious and contemptible. The amazing subtlety, the great learning, and vast logical power of some of the barons, render it all the more necessary to protest against an abuse of these qualities which bids fair to reproduce the very evils which rendered necessary the institution of Courts of equity.

Returning to Mr. Trower's seventh chapter, we find him leaving the region of facts and plunging into probabilities and possibilities; we quit the review of existing evils, and have to consider proposed remedies. As the object of the author is rather to arouse men's minds to the sense of the nightmare that oppresses them, than to give a minute account of the nature of the remedy proposed, it is not surprising to find that this part of the subject is not exhausted, and all possible objections answered. Speaking generally, the proposed change consists in an amalgamation of the systems of law and equity, to be effected by adding, and, when necessary, by substituting, equitable doctrines and machinery for those of Courts of Law. The alteration stated is so gigantic that it is impossible at once to see round it and estimate the consequences; any attempt to do which would be far too lengthy for this place. There is one striking difficulty arising from the difference between the forms and practice of law, which are well adapted for settling matters which can be brought to a single point, and for such matters only, and those of equity, which are too cumbrous for this purpose,

but are on the contrary well suited for giving a complete decision on a complicated subject, however numerous and collateral to each other the different questions. There are, however, many suggestions forming part of Mr. Trower's general plan, which, it is tolerably clear, might, without difficulty, be at once adopted. England has, as we have seen, two separate systems of law; one, whatever its origin, so modified by national habits as to be thoroughly English, the other drawn more directly from Roman sources. What can be more natural than to make a good use of this double system, and to add to each the good elements which are wanting in it and are found in the other? The legislature has already acted on this principle in giving an original jurisdiction to Courts of Law by the Interpleader Act, in cases where a person who has possession of the property of others is oppressed by the difficulty of a disputed claim; in enabling a Court of Law to issue a commission for the examination of witnesses abroad; in both of which cases it would formerly have been necessary to add to the legal proceedings a suit in equity; and by introducing *vivâ voce* evidence into the Masters' office. Why not proceed farther on the same principle, and give to Courts of Law, as Mr. Trower suggests, (p. 75.), the power of issuing injunctions, of granting specific performance, and of taking an account; to which may be added, discretion as to costs, and the power of compelling discovery by an examination of the parties themselves. With regard to this last subject, and, indeed, with regard to the whole law of evidence as at present administered in our different Courts, we can, for want of room, only refer to Mr. Trower's remarks on the subject (pp. 90—101.), which form one of the best parts of his pamphlet. He exposes most admirably the ludicrous, costly, and almost useless, practice of written examination, and the still more idle practice of written cross examination, which, in spite of the excellent example to the contrary daily held up for imitation in our Common Law Courts, still disgraces the Court of Chancery.

One of the changes proposed, viz. the abolition of trial by jury in all civil cases (pp. 86—90.), ought not to pass unchallenged. Mr. Trower states, and perhaps sufficiently

answers, objections to his proposal arising from the supposed superiority in competency and fairness of twelve jurymen; though it is said that long experience rather diminishes than increases the want of confidence a lawyer is disposed to place in the decision of a jury. But there are some considerations which he seems to have overlooked, and which are of no little weight. First, the difficulty of assessing damages without a jury; though this might, perhaps, be got over by a reference to some officer like the Master in Chancery. Secondly, the assistance given by the jury in many cases involving practical knowledge; for instance, upon a commercial question arising before a jury of London or Liverpool merchants. Thirdly and chiefly, the effect produced upon the jurors themselves, and the class to which they belong, by giving to them some kind of education in judicial matters, and by making them feel that they act a part in the administration of the law. No doubt the publicity of a jury trial, and the feelings on the part of the spectators that they might be called to sit and act in it, gives men generally a greater confidence in the system, and prevents that feeling of ignorant terror, which arises in the mind of a layman at the mention of the gloomy and unexplored regions of the Court of Chancery.

The above loose observations and strictures on Mr. Trower's plan are thrown out in the hope that he will be induced to go further into this subject, and to publish, in a detailed and practical form, suggestions for carrying his plan into effect. In New York the amalgamation of jurisdictions has been very recently effected, and in a somewhat summary fashion. With what success it has been attended we have not heard; but the example proves that the idea is any thing but groundless, and has not been found impracticable.

Whilst ably advocating more fundamental reforms, Mr. Trower has been a little unjust to modern alterations of the law (pp. 72, 73.). Too true it is that they have been partial, scanty, imperfect, and often erroneous; but to say that "no principle has been involved in, or evolved from, the abortions of modern legislation," is far too strong. Consider the whole law of bankruptcy and insolvency, the statutes concerning dower,

inheritance, and escheat; the new statutes of limitations; the act abolishing satisfied terms; that which subjects the whole of a debtor's land to his debtor's elegit; that which makes the real estate of a dead man liable for his simple contract debts; and, finally, the late act which gives a civil remedy to the surviving relations in case of an injury which causes death. Something has surely been done in principle as well as practice.

The important chapter concerning Friendly Suits; the "seas of ink and mountains of paper, the reamsful of sollicitors' costs and bagsful of barristers' fees," rendered necessary by useless and purely formal proceedings; short-cause briefs and pleadings; petitions for references which are never refused, and for confirmations of reports to which no one ever dreams of objecting; the repetition upon paper at every step, and in all its original conveyancing verbosity, of a title which has fifty times over been admitted and acted on,—these and other abominations of Chancery, and the methods for getting rid of them, simple as some of them are, which Mr. Trower proposes, we must pass over in silence; observing only, that not only has the Court allowed its practice to become incumbered with all manner of unnecessary expense, but that it does, by the extraordinary and most unjust rule which it has adopted with respect to executors' liabilities, almost compel every prudent man who finds himself holding that unfortunate office to subject the property of the widow or children for whom he is acting to that expense, if he wishes to protect himself against the chance of ruin. Had the Courts acted simply from a desire to cause money to be spent in law they could not have chosen more effectual means.

Mr. Trower's last chapter is devoted to a consideration of the means of effecting such a simplification and publication of our laws as would render them accessible to the community in general. This must be received with some qualification. Better elementary treatises on most subjects we may well have; better and more simple statutes are, no one denies it, most sadly wanted; but to suppose that a highly civilised state of society, and a complicated system of property, can be managed by a set of rules so simple that every man can become his own lawyer, is surely a vain imagination.

There is but one thing more which space allows us to

notice. In the last chapter is a sentence which cannot have been written from the heart. Mr. Trower is urging a general education in law, and says : —

“ Instead of tracing and retracing the profligate romance of poetry, and the fabulous annals of Pagan Mythology, — instead of groping to the verge of manhood after an imperfect smattering in the dead languages — babes in their ignorance of the living — the youth of the aristocracy might ere long be seen laying in boyhood the foundation of a sound acquaintance with the principles of that law which hereafter they may be called upon to administer or enact.” (p. 120.)

An attack upon the exclusively classical character of university education is most praiseworthy, but to general abuse of such studies Mr. Trower's own pamphlet is the best answer. Had he, from the age of seventeen, instead of enjoying Homer, Æschylus, and Aristotle, been employed upon Coke's “ Institutes,” or Roscoe's “ *Nisi Prius*,” or even upon the few good books which form exceptions to the ordinary paste and scissors work of our legal literature, we might have seen his name prefaced to some digest of cases, or some essay on the destruction of contingent remainders, but we should not be indebted to him for a work containing so noble a view of the true objects of law ; such a keen sense and eloquent exposure of the injustice and defects of our present system, and so deep an insight into the evil principles from which they proceed.

ART. IV. — REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMITTEE ON EQUITY.

THE following reference was made to this Committee : —

“ That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice,

and constitution of the Masters and the Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery."

REPORT.

This Committee beg to present a further Report on this reference. There are now two plans of reform before the Society respecting the Masters' office, which have emanated from this Committee. All the reforms proposed resolve themselves into one of these, or belong to one of them. By the first, the present division of labour between Judge and Master is to be left as it is, in a great degree. But the Master is to be clothed with more authority; he is to have, to some extent, an original jurisdiction; he is to have greater power over solicitors. But still it is assumed, by this plan, that in many matters, certainly most litigated matters, two persons having judicial authority are to be employed in the same cause, one of them to hear and dispose of some part of it, and the other of them to hear and dispose of the other part of it. By the other plan the present division of labour is to be altered to a much greater extent, and all that is now done by the Judge and the Master is to be done solely by the Judge. The staff of the Master is to be attached to the Judge, and to be under his direction and control; but a suit, with all its consequences, is to be given to one man, to be worked through by him.

The Legislature has recently appeared desirous of relieving the Master of certain portions of his duties, and handing them over to the exclusive attention of certain other officers of the Court. It has thus acted with respect to matters in Lunacy and Costs. Whichever of the above plans may be adopted, it may be advantageous to inquire how far it is possible to relieve the Master from any of the other duties which are now performed by him. These duties, whether performed by himself or his clerk, it cannot be doubted, are of a most extensive and multifarious nature. Not only has the Court of Chancery the direction of about sixty millions of money, but an immense real estate, of which no exact account can be given, is there retained and administered. The

Court of Chancery is an immense machine for managing property of every description. Lands, stock, private trading partnerships, joint-stock companies, railways, mines, theatres — all come within its jurisdiction, and are there dealt with. It is a seller of land to a great extent. The Court also buys and sells stock by means of the Accountant-General. Nothing is too vast and nothing too small for its grasp. Now, this being the case, it is important to see that the Court, by means of its officers, does all this to the best advantage to the suitor. The Court of Chancery, for instance, is a great taker of accounts. Has it the best means at its disposal of doing this? Are lawyers generally the best accountants? Are Masters in Chancery usually consulted on such matters before they are appointed to their office? Are Masters' clerks always expert accountants? Is this knowledge a necessary part of the qualifications of a solicitor?

The Court is also a seller of estates. Is this altogether a judicial function? The Court of Chancery is a great receiver of rents, a great practical farmer. Are these necessary parts of its duties, and are such matters best and most economically attended to by the Court in its present form?

It is to be observed that the Court of Chancery has no great reputation, in common opinion, as a manager of the property intrusted to its charge. If a farm is ill cultivated, if a house is in ruins, the observation that "the property is in Chancery" seems to satisfy the mind that this state of things is the necessary result of its trusteeship. We do not mean to infer that this popular feeling is entirely grounded on truth. This bad management does not necessarily follow from the protectorship of the Court of Chancery; but we may observe, as an undoubted fact, that although large estates may be able to pay the expense, and thus ward off the ill effects, yet for small estates this expense is absolutely ruinous. Nor is the care taken by the Court of personal estate to be noticed more advantageously. Without a special order, money paid into the Court is not invested at interest for the benefit of those entitled to it. The Court is, in fact, not responsible for the execution of many of the first duties of

other trustees. Not only is it usually slow to hand over the funds of its suitors, but, also, in many cases the talent is buried in the earth, and is restored after many years, at all events not increased in value, to its owner.

Under these circumstances, it does not seem advantageous to prolong the custody, by the Court of Chancery, of property within its jurisdiction, one day longer than is absolutely necessary. At present it often happens that no party to the suit *sui juris* has an interest in bringing it to an end where this is, from its nature, possible; and it, of course, frequently occurs that some parties to the suit may have a direct interest in protracting it. On the one hand, the Chancery Commissioners, in their Report, p. 28., say: "By the present practice, where all parties interested in the administration of trust property which is placed under the direction of the Court of Chancery, being under no legal disability, are desirous of preventing delay; and the solicitors understand their business, and exert themselves to get through the cause; little, if any, more time need be occupied than would be necessary for the proper administration of the same property without the intervention of the Court. If the circumstances of the case are simple, these operations need not occupy any length of time, either in or out of Court." On the other hand, Mr. Pugh, the chief clerk of Sir Giffin Wilson, says, in his examination before the Committee on Fees (1847), in Courts of Law and Equity, to the proceedings of which this Committee will have occasion to make frequent reference:—

Q. 1310. "I think that an ingenious solicitor, who cavils at everything, and excepts to every step which the Master may take, may delay the proceedings without end;" and at Q. 1312. he says, "Inquiries have lasted six, seven, or eight years, which, without vexatious opposition, with proper vigilance on the part of the solicitor, might have been completed in six months."

The experience of this Committee certainly justifies them in stating, as they have already done in former reports, that in many simple matters great and unnecessary delay takes place in bringing suits to a close; and as it seems difficult to arm the Court, whether Judge and Master, or Judge alone,

with full power for this purpose, and it is even more difficult to infuse into the minds of parties themselves the abstract love of justice when it is in opposition to their own interests, it appears necessary that some new machinery should be devised which would represent the interest of parties to the suit not *sui juris*, and of all absent persons; which should protect the property while the suit is pending, and bring it to a close as soon as possible.

There can be no doubt, by the evidence taken by the Committee on Fees, that if the Master himself is not over-worked, his clerk is. Mr. Pugh (before referred to) says: Q. 1387. that "the pressure is so great, that he has paid 100*l.* a year for an assistant out of his official salary of 1000*l.*" And on being asked (Q. 1402.) whether much greater power is not required in the Masters' Office for getting through the work, he adverts to this fact as the practical illustration that this is so. And Mr. Edwards, chief clerk to Master Wingfield, gives similar evidence.

Two questions then arise on this statement: 1. Whether there are not many things which the Court now does that might not be better and more economically performed by officers, by whom the whole of such particular duties should be performed, instead of giving such duties to many? and secondly, Whether there should not be some person appointed in the nature of an official assignee, to expedite the suit and to watch over the interests of absent parties?

In the first place, it should be seen whether all the ministerial duties which are now performed by this Court are incidental to its judicial functions, or are so interwoven in its constitution, as to be absolutely inseparable.

Division of labour and individual responsibility are the great means which may be employed for disposing of business well and speedily. These are admitted truths in carrying on all great works in business in this country. They are fully and beneficially acted on in the practice of the bar, and even to a great degree in the office of the Attorney and Solicitor; but they are almost totally neglected in the discharge of the ministerial functions of the Court of Chancery, where there

is very little attempt to divide the labour, and where individual responsibility may be in a great degree evaded.

I. Management of Real Estate.

Let us first take into consideration the management of the real estate intrusted to the Court of Chancery. This real estate is not managed by that Court, but by receivers appointed specially for that purpose, and who act as officers of that Court, and under its control, having given sufficient security for the due exercise of their duty. They may be said to stand in the same position as the Accountant-General does as to money in the Funds and personal property in his hands.¹ But these officers are appointed to each particular suit on the application of the parties, there being no very efficient check on their proceedings; and they are not always persons the best qualified for their situation. It may reasonably be presumed that if a certain number of persons were to be appointed by the Court, and to devote themselves exclusively to this duty, and were to be allotted to various districts, a better class of persons would be induced to accept these situations; and the particular charges on each estate would be more proportionate to its value than at present. The smaller estates would then have the benefit of the best advice and knowledge that could be obtained at a small expense. The person so appointed would look to his general percentage on the whole of the estates under his management, and would thus receive a sufficient remuneration for his care and labour, instead of looking to one small estate as the sole fund from which such remuneration should proceed. This would be obviously for the benefit of the class of small estates; and the appointment of such an officer would operate beneficially upon these, without being in any way less advantageous to the large estates. Besides, a more uniform and regular system as to the management of estates would be introduced (a point becoming daily more important as agriculture advances as a science); and it further deserves con-

¹ Evidence in Report on Fees, Field, 2. 493.

sideration, whether these officers should not make their return to and fall under the general regulation of some common Head, instead of, as at present, being subject to ten different persons.

This subject is now exciting considerable attention in Ireland, and some measure similar to that proposed, appears to be equally applicable for that country. Mr. Guinness, the present member for Kinsale, on the 2nd of Dec. 1847, stated in his place in the House of Commons, that after an experience of twenty-five years as a receiver under the Court of Chancery, that no class of property in Ireland more required the attention of the House than that which unfortunately was placed under the jurisdiction of the Court of Chancery. The control of those estates ought either to be altogether taken away from the Court, or its powers ought to be enlarged. He had been receiver of an estate in Cork and Tipperary, exceeding 2000*l.* a year, and for twenty-one years not one single shilling had been expended to improve the condition of the tenantry. Another estate of 4500*l.* per annum, in the county of Meath, had been nine years under his care, and in that time only 168*l.* had been laid out in ameliorating the condition of the tenants upon it. A third estate, of 10,600*l.* per annum, had for ten years been under his management; and as the servant of the Court of Chancery, and obeying its orders, he had only been allowed to expend during those ten years a sum less than 600*l.* On another estate, by an outlay of 600*l.*, he had obtained and received in 1846, 1000*l.* over and above the rent; and in 1847 he had received 600*l.* over and above the rent, thus showing the beneficial results of an outlay in improvements. On these grounds he humbly submitted that there were good grounds for asking for the interference of the House to improve the condition of property placed under the jurisdiction of the Court of Chancery.

And the Irish Master of the Rolls has in a very recent case¹ that came before him, very strongly condemned the present system of receivers. It is fairly to be observed, how-

¹ *Reynolds v. Reynolds*, 18th Jan. 1848.

ever, that the system has greater defects in Ireland than in England.

It also deserves consideration, whether the sale of estates might not properly be taken from the Master's clerk (to whom it appears to be now almost exclusively confined), who cannot always be a person having a peculiar knowledge of this subject, and given to this new department, to whom it would more properly belong.

II. Management of Personal Estate.

We next come to the important subject of the management of the personal estate, which occupies so large a portion of the time of the Court of Chancery; and with respect to this we wish in the first place to advert briefly to the office of Accountant-General. Some information on this subject is to be obtained in the evidence to the Report to which we have already referred; and subsequently by a return made in the present session to the House of Commons with respect to the fees of the courts of law and equity. From this it appears that the Accountant-General receives a salary of 600*l.* a year as Master, and 900*l.* a year as Accountant-General, both payable from the Suitors' Fund; but his brokerage in the year ending April, 1846, was, it is said, about 3770*l.* in addition¹, making together 5270*l.*, or more than twice as much as is now received by a Master in Ordinary. The income of the Accountant-General is thus derived in great part from the profit which he makes upon brokers' commission upon transactions with the funds of the suitors. Supposing an order is made to invest money in the funds, of course the brokers would charge a certain brokerage, but the broker of the Accountant-General doing an enormous quantity of business per annum for the Accountant-General, is glad to do it, say for example, at half price. That becomes a great source of emolument to the Accountant-General. It would seem, that if a broker by having the business of the Court to transact, can afford to charge a less price than is

¹ Report on Fees, Johnson, 2. 414.

paid on ordinary occasions, the suitor should have the benefit of this, not an officer of the Court. It also appears to this Committee to deserve consideration, whether the duties performed by the Accountant-General are not remunerated far too highly, by the large amount of salary which is thus received by him.

But this is not the only point with respect to this office, to which we wish to advert. It now happens, not unfrequently, that immense sums of money are placed by the Court of Chancery in the hands of the Accountant-General, who is ordered to invest them, and to receive the dividends from half year to half year, to pay them over to the parties entitled to them, to take care that proper receipts are taken, and to do all the duties of trustees, and trustees' bankers, and for the whole of that duty no charge at all is made. Sometimes the trust may last for half a century or more, during which the Accountant-General, at the expense of the other suitors of the Court who maintain his office, is doing all this work, and all those suitors whose monies are in his hands, pay nothing at all for it. As soon as they have got their funds into the Accountant-General's hands, and have obtained the order for making those payments from time to time, all the taxation ceases.¹ It is generally admitted that the contentious jurisdiction of the Court should be relieved of payments in preference to the ministerial jurisdiction. But it thus happens that the reverse rule takes place. The suitor, forced into the Court to obtain its opinion on some litigated point, pays for the suitor who simply uses the Court as a place of safe custody. This state of things, to which the attention of the Society was directed in one of the earlier papers submitted to it, calls for extensive revision, as, if the fees were properly attended to and adjusted, a fund would be placed at the disposal of the Court, which would be adequate to meet the burdens now improperly placed on other portions of its funds, and this brings this Committee to the consideration of what is called the Suitors' Fund.

The Suitors' Fund was instituted in 1739², when a sum of

¹ Field, 2. 411.

² 12 Geo. 2. c. 24.

35,000*l.* was ordered to be invested, and the dividends applied in payment to the Accountant-General, who was then appointed for the first time. This fund has been added to by different acts of parliament, from that time to the present. It now stands in two separate accounts. It consisted at first of the unemployed cash that then lay dead, and it has increased in little more than one hundred years to the sum of 2,385,088*l.* 2*s.* 6*d.* This is the floating balance of the monies belonging to the suitors of the Court of Chancery. This is one account. There is another account, which is the interest and accumulation of interest on the first account. In 1847 the interest amounted to 100,292*l.* 1*s.* 8*d.* If this Committee rightly understands the facts, this interest proceeds from the balance of the suitors' money in the hands of the Accountant-General, as to which no order for investment has been made; and which, though thus producing interest available for the purposes of the Court of Chancery, produces none to the real owner of the money, when it is handed over to him. The exigencies of the Court may require this appropriation, but the practice does not seem reconcileable with the strict rule applicable to all other trustees, who are not only bound to invest monies in their hands for the benefit of the *cestui que trusts*, but to account for the profits so made.

An annual return is made by the Accountant-General of the charges on this fund, by which it appears that some of the Judges of the Court of Chancery are paid out of it, and even some of the officers of the Court, from whom the suitors in Chancery receive no benefit, as for instance, the Masters in Lunacy and their establishment, as has been fully shown in a previous Report of this Committee.

The Suitors' Fee Fund was established by 3 & 4 W. 4. c. 94., under which all the fees are received by officers of the Court, who are directed to pay the amount received by them into the Bank of England, to the credit of the Accountant General, once a month; the amount to be verified by affidavit.

III. *Accounts.*

The third point to which this Committee is desirous of calling attention is the necessity for making some better provision than now exists for the taking accounts, which form so extensive and important a branch of the jurisdiction of the Court of Chancery. This duty now almost exclusively falls on the Master's clerk¹; and there is no evidence before this Committee which warrants them in saying that there is any peculiar fitness in this officer for this duty. The Chancery Commissioners, as far back as 1826, reported in favour of giving the Masters power to employ Professional Accountants; and it is mentioned in the evidence before the Fees Committee, that an accountant (Mr. Horwood) has been employed by the Taxing Masters to devise a scheme by which they might have a check on their clerks. If this was necessary in this case, this Committee cannot but think that, although not indispensable on ordinary occasions, such assistance would render the taking a difficult account much more easy, and even expedite materially all simple matters. We all know that men do best what they have been trained and educated to do, and what they are best accustomed to; and this Committee believe that these principles are as applicable to the business of accounts in the Court of Chancery, as they are to any other ordinary matter of business.

IV. *Official Assignees.*

This Committee, lastly, approaches a branch of this subject, which appears to them of greater importance than any other in this Report. They conceive that it is worthy of the utmost consideration, whether some officer should not be appointed whose direct interest it should be to collect and distribute the assets involved in the suit and to bring it to an end, when this was from its nature possible.

¹ See Report on Fees, 106

This Committee have no wish to lay too great stress on the successful application of a similar principle in matters of Bankruptcy. They know that in many suits the analogy would fail. Still it cannot be doubted that, in the great majority of suits in Equity, the services of such an officer would be most useful. A discretion then should be vested in the Court as to the appointment of such an officer; and he should only be attached to those suits, the nature of which rendered his services desirable. But it appears to this Committee, that it would not be difficult for the Judge or the Master, according to the circumstances, to form an opinion on this point, and to act accordingly. Such an officer might be so attached, either on the application of any party to a suit, or by the Judge or Master himself, at his discretion, where some of the parties are not *sui juris*. This Committee are now desirous only of submitting to the Society the principle of the appointment of such an officer. The details following on such an appointment it is not here necessary particularly to discuss. But we may mention that it is the opinion of this Committee that such an officer should be paid by a percentage on the assets received in the suit.

We also think that these officers would properly fulfil the functions of Receivers of personal estate, trading partnerships, and such like property, when the suit required such an appointment.

This Committee have, therefore, come to the following resolutions:—

That a certain number of Receivers should be appointed by the Lord Chancellor, among whom, according to the necessities of the case, should be apportioned the real estates under the management of the Court of Chancery.

That the business should be so apportioned as to secure the services of experienced land-agents.

That these Receivers should render their accounts to one common head or department, which should be authorised to issue regulations on this subject, and to allow disbursements for the benefit of the lands under its care.

That to this department should be also intrusted the sale of estates directed to be sold by the Court.

That the whole fee-system of the Court of Chancery requires revision and regulation.

That a small percentage should be levied on all payments made by the Accountant-General of the monies administered by him, which percentage should form a primary fund, to be applicable to the payment of the judicial establishment of the Court; and any deficiency therein should be raisable by fees payable by the suitors in contentious matters before the Court.

That a sufficient number of accountants should be appointed by the Lord Chancellor, to whom should be assigned the duty of taking all accounts required to be taken in the administration of Equity.

That such accountants should have the same powers of easy communication with the Master or the Judge, as is now enjoyed by the Chief Clerk with the Master on similar occasions; and that with regard to all contested points, the accountant should occupy the same position as the present chief clerks of Masters.

That a sufficient number of official assignees should be appointed by the Lord Chancellor, who should, on the motion of one or more of the parties to the suit, or at the discretion of the Court, be attached to the cause where their services were required.

COMMITTEE ON THE LAW OF PROPERTY.

THE following reference was made to this Committee: —

“To consider the propriety of amending the law of landlord and tenant, with respect to fixtures and permanent improvements.”

Your Committee now present to the society the result of their inquiries upon the second branch¹ of the subject, viz., the effect of the law as to those additions to the land called agricultural improvements, which are by their nature inseparable from the soil. This question, which, in the present state of agriculture in this country, is of still greater import-

¹ For the first part of this Report see 7 Law Review, p. 373.

ance than that which relates to fixtures, is also pregnant with much greater difficulties. It is obvious that here the tenant cannot have the choice whether the land shall continue to have the advantage of the improvement or not; it is not here possible, as in the case of fixtures, to make its retention a matter of open contract between the parties: the land must keep the improvement incorporated with it, and the tenant, if he receive compensation at all, must obtain it by means of a legal right to require the landlord to pay for the addition which he has made.

The following questions then arise: —

1st. Is it proper that the landlord should be compelled against his will to pay for an addition to his property?

2dly. What are improvements for which he ought to be obliged to pay?

3dly. Ought not the landlord to have the option of making the improvements himself?

4thly. On what principle, and at what period is the amount of compensation to be determined?

5thly. By whom, in cases of difference, are disputes to be settled?

6thly. In what manner is the claim, when settled, to be enforced?

Different solutions of the above questions have been proposed in the plans laid before Parliament by Lord Lincoln (when Secretary for Ireland), Mr. Sharman Crawford, and Mr. Pusey; and as these plans have been framed and put forward by persons of much experience and much interested in the subject, your committee have examined them, and propose to refer to them in illustration of the conclusions to which they have come. The first two of these plans relate only to Ireland. The case of England, to which this report is confined is, it is true, essentially different. Ireland requires some measure of the kind infinitely more than England: in most parts of that country the great demand for land, the consequent disproportionate amount of rents, and the continual liability of the tenant to eviction for non-payment, destroy any interest he might otherwise

have in permanently improving the soil. To this may be added that it is not, as in England, the custom of land-owners to take on themselves the erection of the farm-house and buildings. This makes a case for legislative interference which does not exist in England; but still the evils, though infinitely greater, are of the same class as those which are felt in England, and are at present under consideration, and the remedies proposed for them must therefore be similar in kind.¹

The first question, viz., whether a landlord ought to be obliged to pay for an addition which he has not bargained for, is a very important one in a country in which the spirit of society and legislation is to such an extent and so increasingly commercial. The same principle of non-interference which dictates the abolition of a law giving to the landlord a benefit which does not come within the terms of his contract, is opposed to the enactment of a law which imposes on him a condition not contained in or deducible from it.

It becomes therefore very important to ascertain what the contract between landlord and tenant really is, and what are the conditions with respect to improvements which, in the absence of any special provision on the subject, may be fairly implied from it.

The existing law implies a duty on the part of the tenant to use and work the land in a course of good husbandry, and to restore it to the landlord at the end of the tenancy in such a state as this treatment would naturally produce. This implied condition appears perfectly fair, and quite in accordance with the principles laid down in the first part of this report. Any improvements, therefore, which fall within the definition of average good husbandry it is the tenant's duty to make; they form part of the consideration for his lease, and can give him no right whatever to claim a special compensation.

It may, however, happen that a tenant introduces, for the

¹ It is, perhaps, hardly necessary to observe that the tenant right of Ulster, now so much talked of, which is said to give the occupier a joint interest with the owner in the subsequent tenancy, is a totally different thing from the right to compensation discussed in this report.

first time, some new and improved system of cultivation which adds materially to the value of the land. Your Committee conceive that this does not necessarily of itself take the case out of the scope of the above-mentioned rule concerning good husbandry. The art of cultivation is continually progressive, and at this time peculiarly so. With this progress the tenant ought to keep pace; his duties increase in the same proportion as his opportunities, and he cannot therefore be considered to have done more than he was bound by his contract to do, only by reason of his adopting in 1850 an improved system of husbandry which was unknown and unpractised in 1830. Greatly as the land may be increased in value by the adoption of any improved method in agriculture, as for instance, the rotation of cropping, a deeper and more active system of cultivation, or a more extensive use of green crops, it must not be lost sight of that it is itself the fixed capital upon which the improvement operates, and has therefore a claim always collateral to, and concurrent with those increased capabilities with which the progress of knowledge and the skill of the tenant may from time to time invest it, and which are frequently only an addition to its value because they are a development of its power. To hold the contrary of this would be virtually to refer back the interest of the landlord to the time when the soil was in its earliest and most worthless state, viz. in a state of waste; for there is no point short of that at which the principle of compensation as against the landlord would stop, if taken to apply to every improved method of cultivation.

These improvements in the system of cultivation are, however, frequently attended with great and extraordinary outlay, which can only be repaid by the increased produce of several years. They are in these cases something more than acts of average good husbandry; they constitute additions to the corpus of the landlord's property, and the making them cannot, therefore, be considered as one of those acts which the tenant is by his contract bound to do. Your committee are fully aware of the prospective and speculative character of all outlay upon land, even when clearly within

the definition of average good husbandry, and of the great difficulty there consequently is in drawing a practical distinction between those improvements in cultivation which do, and those which do not fall within this definition ; but they believe that the distinction really exists in principle, and must be taken into consideration in deciding upon the abstract justice of the claim now in question. To the latter class, therefore, those namely which call for extraordinary outlay, they have now to direct their attention, and with them to those works and alterations, of which draining may be taken as the best example, which obviously add a permanent value to the land. These are all, in fact, contributions by the tenant to the corpus of the property ; by making them he not only treats the land in a certain manner, but, as in the case of erecting fixtures, he makes additions to it. It hardly needs argument to show that neither the duty of making these additions on the one hand, or of paying for them on the other, can be implied from the mere relation of landlord and tenant ; or, in other words, that the parties to the contract cannot be presumed to have contemplated any stipulation with respect to them. Could such improvements, therefore, like fixtures, be removed, there is nothing in the contract which ought to prevent the tenant from removing them ; but as this is impossible, it would be necessary, in order to replace his outlay, to impose upon the landlord by legislation a condition for their purchase, which, as we have seen, does not naturally arise from the contract, and thereby to infringe upon the free commercial principle of leaving persons to manage their own property, and make their own terms. Strict adherence to this principle requires, therefore, that any right to such compensation should be specially provided for by the parties themselves. So far as concerns the requisite knowledge, the tenant can have little difficulty in doing this, for he always has an opportunity of inspecting the farm before he makes his terms ; but it is strongly urged, and appears to be a very general impression, that other circumstances require in this case a departure from the general principle.

It is said that landlords have frequently no knowledge of

agriculture, and that it would be most beneficial to their interests to pass a legislative measure which would afford encouragement to the highest system of cultivation on the part of tenants who have the capital and the knowledge requisite for its adoption: that land is a commodity so limited in quantity, and so important in the privileges attending its possession, as to give the owners an unfair advantage over the occupiers, and to prevent the latter from being able to make fair conditions for themselves: and that, increased productiveness in land being of the utmost importance to the community, the power of landlords, if exercised to the injury and loss of the public, becomes a fair ground for legislation. These objections might, if proved to be of general and substantial existence, induce your Committee to decide the question now under discussion in the affirmative. Desirable as some general body of evidence on this subject appears to be, it does not now exist, and, in the subsequent part of their report, your Committee have been led to suggest the institution of a board or tribunal to supply this want. In the absence of such evidence they feel assured that they are adopting the truest policy in relying on the general principle, that the interest of the public as well as of the owners of property is best consulted by leaving the latter to manage and deal with it themselves upon such terms as they believe most conducive to their own interests. Their answer to the first question is, therefore, with the qualification above mentioned, in the negative.

The second question relates to the nature of improvements which are to be the subjects of compensation. Agricultural improvements, exclusive of things removable, which are treated of in the former part of the report, consist, speaking generally, of roads, fences, watercourses, and works connected with drainage, subsoiling or irrigation; the application of lime, marl, and other permanent alteratives; and also, perhaps, the use of guano, chemical salts, and other foreign and artificial manures, the effect of which is more temporary. With respect to all of these, your committee conceive that unless the compensation is to be estimated solely by the increased value of the land caused by the improvement, the

practical difficulty of which estimation they have shown below¹, any legislative measure must, in order to avoid doubt and litigation, be specific in its descriptions; and considering the present advancing condition of agricultural science, the vast variety of climates, soils and situations, for each of which different improvements are desirable, they are of opinion that it would be almost impossible to give any definitions which would be at once sufficiently explicit and comprehensive. There would also be great difficulty in fixing any general uniform rate of compensation for the improvements specified. Some operations, liming for instance, effect a great change on one soil and very little on another; or the change may be permanent in the first place, temporary in the second: on one farm the operation may be difficult and expensive, on another easy and cheap; so that no uniform statutory rule for each species of improvement could be framed which would be fair for the whole country. Your Committee are confirmed in their opinion on this point by observing that provisions for compensation, now in use, either by force of local customs, or under agreements, are very specific, and differ very widely from each other, each provision being adapted to the peculiar circumstances, situation, and soil of the particular farm or district.

The Government bill for Ireland included nothing but building and draining, and in including draining went beyond the recommendation of Lord Devon's report. Those of Mr. S. Crawford and Mr. Pusey include all the improvements specified above. The former plan would obviously be partial and inadequate to meet the wants of English agriculturists, whilst to frame any sufficiently specific and satisfactory measure on the latter principle would, as shown above, be most difficult if not impossible; and any such measure would probably, after no long period, in consequence of changes in the system of farming, require alteration.

With the existing available resources your committee conceive this difficulty to be insurmountable. If such a board

¹ P. 106, 107.

were instituted as they have suggested below, with a sufficient number of local agents, it would perhaps be possible to frame an act giving a right to compensation in general terms which might be adapted by the local members of the board to the special wants and circumstances of the neighbourhood in which they were acting, and so be made to operate in specific cases.

Next arises the third question, whether the landlord ought not to have the option of making the improvements himself; *i.e.* whether the tenant's right to compensation ought not to be confined to cases in which the landlord has been asked and has refused to make them? Your Committee are of opinion that the landlord ought to have this power. In England the landlord is and ought to be looked upon as entitled to the *corpus*, the tenant to the *usufruct* of the property; it is the business therefore of the landlord, and not of the tenant, to make additions to the corpus. It is obvious that all improvements which raise a claim for compensation are to that extent additions to the corpus, and the landlord ought therefore, in the first instance, to have the option of undertaking them.

This is the principle of the Government bill, and, as to some improvements of that of Mr. Pusey, though it is not adopted by Mr. S. Crawford. In order to carry it into effect the tenant should be required, before commencing the improvements, to give the landlord a notice, containing particulars of their nature and the estimated cost and time of execution; and upon disregard or refusal by the landlord, the tenant should be enabled to perform the works himself, and his claim for compensation should arise.

The fourth question is the most difficult of all; *viz.*, on what principle, and at what period is the amount of compensation to be settled? There are only two standards applicable for this purpose: first, the increase in value of the land at the end of the tenancy, caused by the improvement; and secondly, the prime cost of the works, subject to a proportionate deduction for subsequent enjoyment by the tenant. The first is the one adopted by Mr. S. Crawford's bill as to most improvements; the second that of the Government bill and Mr. Pusey's bill. *Prima facie* there is

much to be said in favour of the former: it is obviously the just, and the only strictly just, method. The tenant would by it, so far as his acts are concerned, be held bound to restore the land in as good, but in no better condition than it was in when he took it, and for all increase of value, arising from his acts, he would receive an equivalent in money. But this method is unfortunately less easy of application than it is just in principle. In acting on it the following data would be necessary in order to come to a conclusion. First, the annual value of the land at the commencement of the tenancy, which might, perhaps, be obtained by reference to the rent, and the poor rate assessment. Secondly, the annual value of the land at the end of the tenancy, which would require a special valuation. Thirdly, proof of the fact that the improvements were made. Fourthly, proof of the extent to which the improvements alone, as distinguished from other co-operating circumstances, have affected the value. Now, without taking into consideration the three former requisites, this last proof alone it would be almost impossible to give. In a country where the state of trade, the making a road, canal, or railway, the building or extension of a town, and many other things, are daily changing the value of land, how is it possible to eliminate all such considerations and to attribute to the improvement just so much of the increase of value as is due to it? It may be added, that so long as population continues to advance, the science of agriculture to improve, and the means and expedients of practical husbandry to increase, land must, as a general rule, become more valuable by the demand upon its resources, as well as by the extension of its capabilities, without any extraordinary expenditure on the part of the tenant. These difficulties, taken with the other requisites above mentioned, are, in the opinion of your committee, quite sufficient to render the first standard inapplicable.

Your committee are aware that this mode of estimation is in practice very commonly had recourse to, and its difficulty and uncertainty not universally admitted. There is, in fact, no class of men who place more entire reliance on their own skill than those who are in the habit of being summoned to

decide as arbitrators and umpires on questions of this kind. Yet they who know them best will be the most ready to admit that a large proportion of them are far from being possessed of any thing beyond a most superficial and empirical knowledge of the subjects involved in the questions which they are called upon to decide; and, even if it were admitted that in some cases their familiarity with agricultural details might enable them, from a single survey, to form a tolerably accurate estimate of the change in the condition of the soil, yet it is clear, from the foregoing statement of the points which would arise, that much more than this would be necessary in order so to fix the fair amount of compensation as to give general satisfaction, and preclude further litigation. That such offices are now undertaken by the class of persons above mentioned, and, for want of a better tribunal, submitted to, is no proof of their actual competency; and in legislating on this subject it should be borne in mind, that the inadequacy of a tribunal is less felt as a grievance when the parties have chosen it for themselves, than when jurisdiction is given to it by the paramount authority of a general law.

The second principle of estimating the amount, viz., by reference to the sum expended, may be applied in two ways. First, the question may be reserved till the determination of the tenancy, and then settled on proof being given of the execution and cost of the work, subject to a deduction bearing for each class of improvements a different fixed proportion to the length of subsequent occupation by the tenant. To this there are several serious objections. The tenant's expenditure is under too little control: he may himself choose what improvements shall be made, without consulting the landlord. Again, the principle is not fair; for the prime cost of the improvement may bear no relation whatever to the increase of value in the land caused by it, which must depend on the skill and foreknowledge of the tenant, as well as on his expenditure, so that the landlord might have to pay very largely for a very small benefit, or the tenant receive an inadequate remuneration for a very large one. Lastly, it would be almost impossible to devise a general scale of de-

duction for subsequent enjoyment applicable to the whole country : an operation which improves the land for two years in one district may be felt for three times that period in another : the materials used in one place may be perishable ; in another they may endure for an indefinite time. These objections it is not easy to overcome.

It remains to consider the second way of applying the same principle. This is effected, as before, by making the amount of compensation bear some relation to the cost of the work ; fixing its amount, however, at an earlier stage of the proceedings, before the work is commenced. This method requires, of course, that the landlord should have notice beforehand ; and therefore, can easily be made available for carrying out the suggestion already made by your Committee, that he ought to have the option of doing the work.¹ It also avoids the objection arising from the tenant's uncontrolled power ; and, to a great extent, that arising from the unfairness of the standard : for the amount of compensation is settled and limited beforehand, if not by agreement, by a fair and competent arbitration ; and being so, the work may be looked upon as a joint speculation of the landlord and tenant, in which each has agreed beforehand on the principle on which the profits are to be divided.

The difficulty of making a general scale for deduction for subsequent enjoyment, extending to the whole country, still remains. But supposing that objection to be met by some such means as have been suggested², your Committee are unable, at any rate with no more resources than at present exist, to suggest any course by which this proposal could be carried into effect, which would be free from great complication and practical difficulty. If the proposed improvements are to be the subject of litigation before they are executed, and the fact of their proper completion open to dispute, as it must be, afterwards, proportionate opportunities are given for delay and vexation. The Government bill for Ireland, which seems to have been very carefully considered, is so good an illustration of the difficulties which beset this

¹ P. 106.

² P. 105.

method, that it is worth while to give an outline of its provisions.

Under it the tenant is, in the first instance, to give a notice, to which the landlord may accede, and either undertake the work himself, charging the tenant with additional rent at a rate fixed by the bill, or agree upon a compensation. If he does neither, the tenant may give a second notice; to this also the landlord may accede, and undertake the work, charging additional rent as before, or he may specify objections: in this latter case arbitrators are to be appointed, with an appeal to the Assistant Barrister. On the award being settled, the landlord may still do the work himself, charging additional rent. On completion, the person doing the work is to give a notice to the other, and upon this an appeal to the barrister lies, on the ground of imperfect execution: and in case of non-execution an appeal also lies. In case of non-execution by the landlord, the tenant may complete the work himself, and recover damages. In case of execution by the tenant, the landlord may pay down the compensation at once, and claim the additional rent. The tenant's compensation is never to exceed three years' rent, and to be reduced in proportion to the period after the improvement during which he holds the farm; such proportion being fixed by the bill, and differing according to the species of improvement.

All the notices, awards, and decisions are to contain minute specifications of time, cost, and description. There are no less than six which may, and four which must be made and delivered, in disputed cases, before compensation can be claimed. One arbitration is, in such cases, inevitable; two are probable; and from each an appeal lies. In addition to these proceedings, several registrations are necessary.

Your Committee think it probable that such a system would either be useless from its complication and the difficulty of working it, or that it would produce frequent and long-continued litigation, expense, and delay. They also think that it would not be possible to amend the plan in such a way as to remove these objections.

Such being the difficulties which surround all the methods hitherto proposed for fixing a standard of compensation, your Committee cannot with confidence recommend any of them as likely to be successful: they think, however, that if a choice is to be made, the one last considered, and embodied in Lord Lincoln's bill, is the least objectionable. Supposing no steps to be taken for establishing more efficient agricultural tribunals, they are unable to suggest any other course except that of throwing the matter at large into the hands of arbitrators, which would only be to shift the difficulty from the legislature to an incompetent judge, and would obviously, by giving rise to litigation upon litigation, be a pregnant source of evil to all parties concerned.

It is, however, possible, that if such tribunals were established as are recommended below¹, they might be able to deal with these questions in a more satisfactory manner. Whether they could do so with advantage would be soon seen from the manner in which they disposed of questions arising under the present law. The details of their practice, supposing the principle of compensation to be established, would then be best derived from their own experience and suggestions.

The fourth question, By whom are differences to be settled, acquires additional importance from the foregoing statement of difficulties. If the landlord is to determine what improvements he will pay for, there is no necessity for legislation; for he may exact any conditions he pleases, as the price of his assent to the suitableness of the proposed work. Any such assent made by him, with the knowledge that it would be followed by a statutory right to compensation, would amount simply to an agreement to grant compensation, which may be made just as well under the existing as under any altered state of the law. Your committee would not have thought it necessary to notice this view, if it had not been applied by Mr. Pusey's bill to all cases of permanent improvements made by a tenant having five years of his holding to run. If, on the other hand, the tenant is to be the sole judge

of the propriety of making improvements, and of the extent to which they are to be carried, great injustice may be done to the landlord, by saddling him at the end of the tenancy with a heavy charge, which, though it might ultimately be repaid to him or his successors by the increased value of the land, might be inconvenient and unfair for him to be called upon at that time to pay. None of the plans proposed go to this length; they all limit the compensation by making its extreme amount bear some proportion to the annual rent, and within this limit they provide a tribunal for the settlement of differences. It seems however to be very generally admitted, that no existing court or tribunal possesses all the qualifications necessary for this purpose. To the judge and jury at assizes there exist, independently of considerations of expense, the objections, that the judge has not necessarily any knowledge of agricultural matters, and that the jury, whether consisting of common or special jurors, do not hold a sufficiently neutral position. Arbitrators are, if chosen from the legal profession, incompetent to deal with agricultural questions, and, if selected for a knowledge of agriculture, are unable to frame an award which would constitute a legal and effectual adjudication between the parties.

This has led your Committee to conceive that it might be attended with advantage if reference could be had to some tribunal possessed of both legal and agricultural knowledge, whose special business should be to deal with matters relating to agriculture. Holding the views they have elsewhere expressed concerning the difficulties which beset this subject, they cannot at once recommend the enactment of a law giving the tenant a right to come before such a tribunal, and there claim compensation. But they think that the evidence requisite to establish such a case as they have before stated to be in their opinion necessary for the enactment of any such law, can, if it exists, only be obtained through the medium of some machinery of the kind, and that, if such a case should be made out, some tribunal of the sort would be absolutely necessary in order to give the new law a fair trial; whilst, on the other hand, if the evidence should fail to establish such a case, the question which is now causing consider-

able agitation and uneasiness would be fairly and finally settled. Your Committee would, however, hesitate in making the above recommendation, if it were not for the concurrence of other desired objects which they think might be answered by its adoption. It appears to them for the reasons stated above, that there is now no tribunal whatever uniting legal and agricultural qualifications in such a manner as to be capable of deciding satisfactorily questions relating to husbandry, whether arising under the common law, under customs, or under agreements. This want your Committee believe to have been felt by landlords as well as tenants, the former of whom are now unable actually to obtain that reciprocal remedy which the law theoretically offers them for the injury inflicted on the land by a course of bad husbandry.¹ Another very important consideration is the appropriate facility which such a board would supply for collecting agricultural statistics. It is quite needless here to dwell upon the importance of such knowledge to this nation and to all corn-producing countries. The subject has occupied the attention of two successive governments; but up to this time both have been baffled from a want of adequate local machinery. Your Committee, therefore, think that these different objects, viz. collecting evidence on the subject now under discussion, affording means of working the proposed law, if such should be found desirable and practicable, and, if no such law is made, settling agricultural questions and procuring agricultural statistics, would justify the establishment of such a board or tribunal.

Whilst considering the purposes and conditions of such a tribunal, and the different questions opened by the subject of tenant compensation, the attention of your Committee has been in an especial manner drawn to an institution which was established in this country at the close of the last century under the appropriate name of the Board of Agriculture. With a view as well to remedy the inconvenience of irreconcilable local customs in the administration of the law, and the decision of mixed questions of law and agriculture,

¹ P. 116.

as to disseminate the knowledge of such customs as were in both respects most desirable for general adoption, this Board was established by Government in the year 1793, under the presidency of Sir John Sinclair, with the late eminent agriculturist Arthur Young as secretary. Their labours were chiefly directed to the arrangement of accurate agricultural surveys of every county in the kingdom, and the collection of the local customs between landlord and tenant, and between out-going and in-coming tenants. These surveys were made by men thoroughly competent to the task, acting under the sanction and direction of the Board, and thus aided, the best sources of information were open to them: they had access to all the most experienced persons engaged in or connected with the agriculture of each county and district, and the result of their inquiries, which extended to many points of a statistical nature, though invaluable in a merely agricultural point of view, has been subsequently adopted as a sort of code of agricultural law based upon the necessarily local customs of different soils and districts. A tabulated compendium of these customs under the name of Kennedy and Grainger's practice of tenancy, being incorporated in the law books relating to the subject of landlord and tenant, is now recognised and acted upon in deciding many complicated questions at assizes, and forms, in fact, the sole existing reference on the subject. On the completion of this part of their task, the Board was dissolved in the year 1813 through causes unconnected with its great and acknowledged utility. Your Committee are informed that the operation and effect of that Board, being partly of an administrative character, are constantly spoken of in terms of high value and regret by those who remember its existence, and there can be little doubt that it was calculated to accomplish much more than it actually did towards satisfying those wants, of which the present question of tenant right may be taken as the most prominent illustration. Your Committee point with less hesitation to this institution, inasmuch as its form and purpose have been aimed at by the establishment of many societies of late years, but with an ill success proportioned to the want of a general plan of comprehensiveness and of ac-

knowledge authority by which they are necessarily characterised, as well as by the legal incompetency of their members to entertain skilfully or effectually the mixed and complicated questions to which the growing relations of landlord and tenant have given, and will continue to give rise.

The sixth and only remaining question is as to the way in which claims for compensation, if established at all, should be enforced. The landlord may be the absolute owner, or tenant for a limited time with a power of leasing. In the first case the doubt is, whether the sum due ought to be a charge against the person or the land exclusively, or against both. Your Committee feel no doubt, under the circumstances stated in their consideration of the first question, that it ought to be a charge upon the land alone. The best way of effecting this seems to be to give the tenant a rent charge upon the land, in the same manner as is done by the Drainage Act, 8 & 9 Vict. c. 56., making it, however, to last for a shorter period than twelve years, the minimum of time fixed by that act. It would be well also, if found practicable, to limit this rent charge, so that it never should be greater than the amount by which the rent received under a new tenancy exceeds the rent received under the old one. If this were done, the landlord could never have actually to pay money out of his pocket, which he might frequently with justice consider a grievance. Whether this payment by instalments would be any great boon to the out-going tenant, is a matter of question ; but though from a want of privity between the out-going and in-coming tenants, it is impossible to legislate on this subject as between them, your Committee have reason to believe, that as a matter of general practice the landlord and the in-coming and out-going tenants would make some arrangement by which the whole sum would be paid at once.

The lessor may, however, be only owner of a limited interest in the land. This touches the difficult subject of enabling persons in the possession of estates to deal with them for the purpose of improvement as if they were absolute

owners. Your Committee are fully aware of its importance, and of the general feeling amongst agriculturists that some alteration of the law is required. They think, however, that a full discussion of the subject, and an account of what has already been done in this way, would afford ample matter for a separate Report; and as in this they have confined their attention to the question of compensation as between the landowner, considered as representing one interest, whether actually held by one person or more, and the tenant as representing another, they content themselves with expressing a general opinion that every person who has a power of leasing ought to be able to make his leases as beneficial as possible to the owners of the reversion, the farming tenants, and the public.

In conformity with their original design, your Committee propose, in the last place, to consider what are and what ought to be the rights of landlords and the duties of tenants with respect to deteriorations made or suffered by the latter in the soil; or, in other words, what are and what ought to be the remedies of the former in case their land is returned upon their hands diminished in value. The theory of the law has, in this respect, been not unfavourable to them. For all acts of waste, such as changing the course of husbandry, ploughing ancient meadows, or turning arable into woodland, it professes to give a remedy. It has also been distinctly decided, and appears to be settled law, that in cases where there is no special contract on the subject of husbandry, the mere relation of landlord and tenant is sufficient to raise an implied promise on the part of the latter that he will use the land in a course of good husbandry according to the custom of the country, meaning by custom, not any definite legal custom, but the common practice of good farmers in the neighbourhood.¹ Upon this implied promise the landlord can bring an action, if the tenant, by any notorious violation of the common rules of good husbandry, injures the land. But this promise does not extend to mere neglect and bad farming, however injurious, where

¹ *Legh v. Hewitt*, 4 East, 154. See also 1 Marsh. 569.

no such flagrant and notorious breach of well known rules is committed.¹

It is, therefore, clear that the law has adopted the view of the tenant's duties above laid down; and it has, so far as its present means extend, endeavoured to enforce them. But unfortunately it is not provided with adequate machinery for this purpose. The difficulty there is in ascertaining the practice of any particular district must occur to every one. The insufficiency of existing tribunals, mentioned above as one of the reasons for not legislating on the subject of compensation; is found in practice to be an insuperable obstacle to the landlord's obtaining his remedy. Actions against tenants for these injuries are therefore hardly ever resorted to. This fact alone furnishes a sufficient objection to any attempt under present circumstances to carry the law farther in the same direction, and to give the landowner a remedy for less palpable injuries to his property. It is hardly necessary here to go in detail into the various difficulties which beset the subject, as they are of a kind precisely similar to some of those mentioned above as standing in the way of compensation. To ascertain and settle what acts, or course of action, on the tenant's part should render him liable, and what should be the measure of his liability, must involve questions of as much nicety as fixing the nature of improvements for which he is to be compensated, and the amount he is to receive. Although, therefore, your Committee are fully convinced of the abstract justice of the principle of giving the landlord a complete remedy for all deteriorations, they think that the actual law goes as far as its rude machinery will allow in carrying this principle into effect; and they rely on the difficulty of doing complete justice by the landlord in this case as an additional reason for not attempting in the case of compensation to do what is not quite so clearly justice by the tenant. If, however, the tenant's right to compensation for improvements should be considered to call for legislation, they think that it would be a mere matter of justice to attempt to give the landlord a remedy for

¹ Per Parke B., 1 M. & W. 472.

every deterioration. If, indeed, the suggestion already made for instituting a more efficient tribunal were adopted, it might be possible to carry out more fully the principle on which the present law is founded. But, even if this is not to be attempted, the practical failure of the law, as it now exists, is, it appears to your Committee, a very strong reason for adopting that suggestion.

Some valuable arguments as well as much useful information on the subject of compensation, bearing incidentally on England, may be derived from the Report of the Parliamentary Commission on the occupation of land in Ireland, and from the evidence taken by them. As regards Ireland, there is scarcely a witness examined on the subject who does not bear testimony to the extreme want of some measure which shall give to the tenant sufficient interest in the land to induce him to improve it. By far the greater number speak in favour of some legislative measure for giving the tenant compensation : many go into the details of what they conceive would be a proper scheme—schemes for the most part similar to those mentioned above. The persons who do so are not farmers alone : merchants, bankers, lawyers, agents, proprietors, all feel the want of some measure of the kind. And yet the Commissioners in their report, although they recognise the justice of the general principle, and the expediency of adopting it where practicable, confine their recommendation of compulsory measures to improvements in farm buildings, leaving any contribution on the landlord's part towards other improvements unnoticed. Their reason for this omission was probably their sense of the impracticability of framing any measure or machinery which should adjust the rights of landlord and tenant in a sufficiently simple and satisfactory manner. The bill introduced by Lord Lincoln went, as we have seen, a little farther : it included draining, but no other improvements. If in Ireland, where the proprietors of land are so few and the tenant cultivators so many, where land is in so backward a state and so much encouragement is confessedly needed by the farmer, the Commissioners thought any such measure impracticable ; it is a strong argument against the

adoption of any such change in England, where the landlord is so much more attentive to his real interests, the practice of granting leases as well as of contributing towards improvement so much more general, where the market is less overstocked with competitors for the use of land, and the tenant consequently more able to make good terms for himself. Indeed, some of the witnesses who had been in the habit of managing estates in England and Scotland as well as in Ireland, in their examination before the Commissioners, attribute the great superiority of cultivation in the former to the long-established practice of effecting improvements by the voluntary co-operation of landlord and tenant, and Mr. Sharman Crawford, the great advocate of the scheme for Ireland, states in his evidence that he does not think it necessary in countries where there is not so great a demand for land.

From such means of knowledge as are open to them, your Committee believe that the practice of giving assistance to tenants for making permanent improvements is on the increase, and that it is effected generally by means of a special agreement or understanding containing stipulations most beneficial as regards the particular situation or estate, but which it would be utterly impossible to make the foundation of any general law. Your Committee believe that increasing efforts are making to awaken landowners to what is their real interest as well as their duty to their tenants and the public in this particular, and that these motives will in time be found sufficient to effect the object desired; they believe that hasty or peremptory legislative interference might produce alarm and occasions for aggravation, which would necessarily delay the progress of this good work; for these reasons, therefore, as well as for those stated above, they are disposed to deprecate any legislation on this subject, whilst at the same time they feel that the efforts which have been made in Parliament and out of it, have had and will have a most beneficial effect in calling the attention both of landowners and tenants to their real interests and their duties to each other and to society.

It is, perhaps, hardly necessary to add that they have not contemplated the bare possibility of any legislation which

should interfere with any special provisions which persons may make for themselves.

In conclusion, your Committee wish to call attention to the suggestions they have made, with a view to obtain more satisfactory information for the purposes of legislation, and to render legal remedies more available; but they cannot, though fully alive to the importance of the object proposed, recommend any present alteration of the law respecting the improvements in question. They think, however, that, in such alteration, if attempted at all, the following principles should be adopted:—

1. Improvements for which compensation is to be allowed should be carefully specified by means of information obtained from persons of agricultural experience.

2. No compensation should be given unless the tenant has given the landlord the option of doing the work himself.

3. The propriety, extent, and cost of the work should be settled before it is done.

4. Disputes should be settled by arbitration.

5. Compensation should be limited by reference to the annual rent; and within these limits its measure should be the prime cost of the work, subject to a deduction, bearing for each class of improvements a different but fixed proportion to the length of subsequent enjoyment by the tenant.

6. It should be subject to deduction, *pro tanto*, in case of incomplete execution.

7. A subsequent holding should, for the purpose of compensation, be considered a continuing holding.

8. If the landlord is the absolute owner, the compensation should be recoverable as a charge on the land in the nature of a rent-charge.

They consider, lastly, that any such alteration should be accompanied by an extension of the present law concerning bad husbandry, so as to give the landlord a remedy for all deteriorations in his property caused by the acts or neglects of the tenant—disputes to be settled as in the case of compensation.¹

¹ Since these sheets were in the press, two new bills on this subject have been laid before the public; one by Mr. Pusey, for England, the other by the

On the reception of the Report by the Society, the following resolutions on Tenant Right, of which notice was given in the Committee, were agreed to.

1. That the Report be received.
2. That while this Society fully admits the difficulties which attend any direct legislation on the subject of compensation for unexhausted improvements of the land by the tenant which is now called Tenant Right, yet that this Society considers that it is both just and expedient to admit, and if it be possible to enforce, the existence of such right.
3. That although no uniform rule exists respecting such right, it has long been acted on and sanctioned in different parts of England and Wales by the custom of the country.
4. That the existence of such a right is highly favourable to the promotion of good agriculture.
5. That the existence of such a right tends greatly to the benefit of good tenants and good landlords, while the denial of any such right would operate chiefly in favour of bad landlords and bad tenants.
6. That this Society considers that the existence of such right should be the basis of all agreements on the subject.

Government, for Ireland only. That of Mr. Pusey does not materially differ from his bill of last year, except in enabling persons in the possession of estates to make agreements for compensation which will bind their successors, and in providing for the transfer of the claim from an out-going to an in-coming tenant. The former provision is not sufficiently guarded to prevent fraud and collusion; and the latter appears to be founded on the erroneous principle of keeping up the title to the improvement as a thing distinct from the land. The Government bill is open to the same charges of intricacy, though perhaps in a less degree, as the previous Government measure, and does not fully carry out the principle contended for, since it applies to those cases only in which the landlord puts an end to the tenancy.

ART. V. — MINISTER OF JUSTICE.

THE necessity for a Minister of Justice becomes daily more and more evident. Law reform is universally demanded, — demanded in every branch of the law, in the law of pleading, the law of real property, the law of debtor and creditor, the administration of justice in Chancery, and more especially in the Masters' office, to which everything goes, and where everything lingers, in the Ecclesiastical Courts, in the criminal law. Turn where you will, you find in the law itself, the construction of the Courts which administer it, and in the construction of the Acts of Parliament which profess to mend, but only botch it, something which everybody complains of. A spirit of inquiry, a thirst for reform, is abroad. Every one feels, that whilst all other things have progressed, — our manufactures, our locomotion, our scientific inquiries, our trade and commerce, — law and its institutions alone have all but stood still. There, old absurdities continue, not indeed unrebuked, but unamended. A dispossessed owner of land ~~wants to recover it~~, he goes to his lawyer, and asks him what he must do. "You must bring an action of ejectment," says the lawyer, "and therein you must state, that you let your land to one John Doe, and that Doe took possession, when, lo and behold! one Richard Roe appeared and ejected Doe; and you must demand justice against Roe." "But," says the client, "I never heard of these people. I never let my land to Doe, nor did he ever possess it, so Roe could not have turned him out." "Oh! never mind," says the lawyer, "what you will have to say is all false! but it is only a legal fiction." Again, a dispossessed owner of furniture wants to recover it. He also goes to his lawyer, and says, "What am I to do?" "You must bring an action of trover," says the lawyer, "and you must state, that you *casually*! lost the furniture, and that your antagonist *casually*! found it; and converted it to his own use." "But," says the client, "I never lost it, nor

did he ever find it. If I state all that, I shall state nothing but falsehoods." "Oh!" says the lawyer, "never mind that; they are only legal fictions." These, and other absurdities of the same stamp, are merely ridiculous—food for merriment; practically they do no mischief; unless, indeed, the sanction which the law thus gives to falsehood reacts on society, and has a tendency to create a belief, that falsehood cannot be wrong, since the law sanctions it. Other absurdities, however, there are, which are not laughable only. They are mischievous. The dispossessed landowner proceeds by ejectment. After he has incurred great expense in taking the necessary steps in a Court of Law, he discovers that there is an old outstanding term, as it is called, in some one, and that his remedy is in Chancery, not at law, and he has to begin afresh, and a double expense is incurred. Again, a person sues on a bill of exchange. His case is a clear one. His adversary, knowing that he has no defence, but wishing to gain time, files a bill in Chancery to obtain an order on the plaintiff at law not to go on, till he has fully answered the bill in Chancery; and to make it difficult for the creditor to answer the bill, the defendant's counsel makes it as long and as complicated as he can. The bill may be all pure invention, for no security whatever is taken, that it shall contain one word of truth. The debtor is not bound to swear to any one fact he thinks proper to allege. And to make the hardship greater, the poor creditor, kept out of his money, is obliged to pay for a copy of the bill, however lengthy it may be, at an expense four or five times as great as he could get it copied for by the dearest stationer in Chancery Lane. So that here we have two of her Majesty's principal Courts, one ready to go on and do justice, if the plaintiff would but move it to do so; and the other, strictly enjoining the poor plaintiff not to move it; and the consequence is, that between these two stools justice drops to the ground. Is it possible to conceive a system more absurd? And upon what fancy is it founded? On this, we presume, that the Judges at law, men selected from their profession for their great eminence and success, are idiots, a sort of people totally incapable of understanding the first principles

of justice. For on what is the plaintiff's case in Chancery founded? On the principles of equity. But the principles of equity are those of justice and common sense. Then, surely, those who are capable of seeing their way to justice through the complicated pleadings, ridiculous fictions, and antiquated nonsense of the common law could comprehend and deal with the simple principles of equity, justice, and common sense, on which the debtor's bill in Chancery is founded; and if this be so, the natural conclusion would be, that if the debtor has a defence in justice, which the nonsense of legal pleadings excludes; or if he has a defence, which can only be proved against the creditor by interrogating the creditor himself, and compelling him to purge his conscience on oath, the required object should be obtained by a bill, filed in the same Court of justice in which the creditor had sued, and that the assistance required should be obtained *there* and not elsewhere.

Then, again, look at the monstrous expenses connected with the transfer of real property. There is a small piece of land, eight or ten acres perhaps, lying in a locality which makes the ownership of it singularly valuable to a resident on the spot. The actual owner lives far away; and to him the land is of little or no value. The resident wants the land — the non-resident its value in money — perhaps to lay out in buying land under his nose where he resides. The exchange would be a great advantage to both parties. What prevents it? The expense of transfer. You cannot purchase land, the law says, with any safety, without examining, through your legal agents, every deed relating to the land which may have been executed in the previous sixty years! Expenses equally unreasonable must be incurred in cases of mortgage. A poor man has a small property, and wants to borrow some money on it. To do so, and satisfy the lender, he must, through his own lawyer, lay before the lender's lawyer satisfactory evidence of title, extending over sixty years! Imagine him to have incurred the great expense consequent on such a transaction; and then imagine that the lender should happen to want his money back in a couple of years; and that the borrower, unable to repay it out of his own funds,

should be obliged to borrow again of another lender on the same security; think what an accumulation of expense is the consequence. The sixty years' history was investigated only two years before at enormous expense; and now, in two years, the same inquiry is to be repeated by the solicitor and counsel of the new lender, almost always different persons from the solicitor and counsel of the late lender, and therefore wanting new fees and running up new expenses.

Consider, too, the law of debtor and creditor, of which the "Times" (really speaking the public sentiments) has not hesitated to say, that "it is rotten to the foundation," that "it would be better to get rid of the whole existing system, and rebuild from the very foundation," and of which a large body of merchants and traders, including Members of Parliament, collected at a public meeting in London, in February, 1847, declared in a resolution, unanimously passed, printed, and published, that it is "a disgrace to a civilised community." Well might the meeting say so, for, under that law, the highest classes, members of the Houses of Lords and Commons, are aided by peculiar privileges, such as exemption from the law of arrest and that of Bankruptcy, in evading the payment of their own just debts; and they are aided by other privileges, such as the law of distress, in enforcing the payment of those debts which are due to themselves — debts for rent. And under the same law the inferior classes are encouraged to cheat each other, by being told that, let them incur what debts they will, they may, if sufficiently knavish, practically evade both payment and suffering. They may evade payment by shifting their property into another man's name, by contrivances the law is too blind to see through; and they may evade suffering, because imprisonment for debt is deemed to be cruel, though imprisonment for offences against the game laws is not.

Then look at the Court of Chancery. What is the system there? Is it not practically this — that no sooner has the suitor, at enormous expense, brought his cause to a hearing before the Judge, than he finds all the real difficulties of the case handed over to a person who is not even a Judge, and who has, therefore, neither the authority, the power, nor the

influence of a Judge, who sits in private, and is universally considered a shelved man; and who, therefore, has no motive for exertion; — not love of fame, because he sits in private; not hopes of promotion, because he is a shelved man — and who, if in the first burst of enthusiasm, he attempts to expedite matters, soon finds that he is perpetually swimming against the stream, and that, as his exertions will be without reward, so will they also be without fruit?

Of the Ecclesiastical Courts little is known, and that little is unfavourable. The criminal law is that, perhaps, to which least exception can be taken; yet, even there, there is much room for amendment. What, for instance, can be more absurd than that the killing of an antagonist in a duel fairly fought, in the face of day, in the presence of impartial persons, ready to see that no unfair advantage is taken on either side, should be looked upon as a crime of the same hue, and involving the same punishment, as the breaking into a house in the dead of night to effect a robbery, and murdering one or more of the inhabitants? Of course the effect of such a law is, not severe punishment, but total impunity. The delinquent is generally acquitted on some quibble, to which the Court and jury give a willing, if not an eager, reception. We have lately had a public discussion, in the case of Frost and his companions, which proves how much amendment is wanted. They were found guilty of a gross offence against the laws, which subjected them to transportation. After all the expense, labour, and anxiety of the trial had been incurred, and a conviction obtained on the merits, it was moved that they should escape scot free. Why? Because the law required that a copy of the indictment should be handed to them a certain time before the trial, and that a list of the intended witnesses should be handed to them *at the same time*; and it appeared that the attorney for the prosecution had, in his over-anxiety to do them full justice, handed them a list of the witnesses a day or two earlier than they had a right to have it, and the copy of the indictment at the regular time; and in consequence the two were not delivered *at the same time*. The guilty men were within an ace of escaping on this frivolous quibble, and yet, from that time to this,

nothing has been done to close this loop-hole in the meshes of law for guilty men to creep out at.

How are these evils to be removed? How are the improvements suggested by individuals through the press, discussed from time to time, and at last sanctioned by public opinion,—how, we ask, constitutionally speaking, are these improvements to be carried out, and actually reduced into practice? The only answer that can be given is, that the constitution really and practically furnishes no means whatever except hap-hazard. The only instrument of legislation is Parliament; and, as there is no Minister, whose peculiar and exclusive duty it is to consider, mature, and bring before Parliament all proper amendments of the law, and there is no one man, or class of men, whose peculiar and recognised duty it is to frame those Acts of the Legislature by which amendments are to be effected, our legislation is really and truly hap-hazard legislation. It is mere matter of chance what measures shall be brought forward, and equally so, whether the legislative language shall be intelligible or nonsensical.

It may be said this is not true. The Lord Chancellor is the Minister of Justice, and all bills brought into Parliament bear the indorsement of particular members, who are responsible for the language of the bill. But is the Lord Chancellor the Minister of Justice? We profess to have the same knowledge of the constitution that the educated classes generally possess, and we protest we do not know whether the Lord Chancellor is the Minister of Justice, or not. To us it seems that the assertion, that the Home Secretary is the Minister of Justice sounds at least as plausible as that the Lord Chancellor is. Now, surely, it is a strange state of things, if persons of education, upon being asked by a foreigner, who was the Minister of Justice in England, should be unable to answer the question plainly and positively, yet we confess we should hardly know what answer to give. But let us assume for a moment that the Lord Chancellor is the Minister of Justice; is he capable of performing the duties of such an office? has he time for them? Look at his other avocations. He is head of the Court of Chancery, and is obliged to give constant attention to his judicial duties, for

in his capacity of head of the Court of Chancery he has to correct the mistakes of no fewer than four judges of that Court. The cases that are brought before him are not matter of routine. It is presumable that they are all matters of difficulty, for they are cases in which, in the estimation of counsel, the judge of the Court below has erred. Now it is a strong measure to pronounce that another Judge has erred. It may therefore be concluded, that in every case a Judge of appeal would take great pains to avoid error, and he would do so the more, because he would naturally feel that, as his decision would be a precedent to settle the law in all future cases, his decision, if erroneous, would not merely do injustice, but would unsettle the law. This, therefore, is a most burthensome and a most anxious duty, amply sufficient to occupy the whole time of any one man.

But the Lord Chancellor is also the most important judicial functionary in the highest court of appeal—the House of Lords, and his duties there cannot but be extremely onerous. He has also the disposal of enormous patronage in the church. It is said that he has eight hundred ecclesiastical benefices in his gift. If he exercises this patronage conscientiously, and as he ought to do, that is, with an honest desire to do his very utmost to encourage a zealous performance of their duty by the clergy, the inquiry into the claims of the different applicants for promotion could not fail to occupy much of his time. He has also the giving away of a vast number of places in the law, probably some hundreds. It has been recently stated in print, that in the Court of Bankruptcy only he has the patronage of between ninety and one hundred places, the average annual value of each of which was not less than 1000*l*. Besides this, he is a Cabinet Minister, and must take part in the deliberations of the Cabinet, and, as he is a party man, who loses more in revenue, power, and patronage, by going out of office, than any other member of the government, it cannot be doubted that he must take at least as much interest in the tactics of party, as the most eager politician of the day. To all these duties is superadded, according to the supposition, that of Minister of Justice, the duty of all others the most burthensome.

Then let us consider what the duties of a real minister of justice would be, — what should be the construction of his office, and what his position in the state. And first, as to his duties and the construction of his office. It would be his duty to make himself acquainted with the general plan of the law of England; he would study its excellencies and its defects; he would seek information as to the laws of other countries, and see whether any of their principles or arrangements could advantageously be imported into this country; he would gradually form a library, at the expense, and which would be the property of the public, and in it he would take care to include every work that had ever been written, from the earliest times, by the sages of the law, on the defects of the law and the possible improvements which experience had suggested to them; he would receive, consider, and record all cases of reasonable complaint against the results of the existing law, and all suggestions for improvement, which might emanate either from the experience of age or the zeal and enterprise of youth. Much, no doubt, would be submitted to him which was fit only for the waste-paper basket — the fancies of madmen — the dreams of the foolish and the meddlesome. But he would soon learn to distinguish between papers which deserved consideration and those which deserved none. And he would not fail to give a careful perusal to those which had either weight in themselves or were transmitted by judges, magistrates, counsel, or solicitors of eminence, and other persons, whose position entitled their opinions and suggestions to full consideration. He would be in constant communication with the Judges, and would require of them all such information as their offices would enable them to furnish. He would also be in constant communication with the inferior officers of courts of justice; from them also deriving most valuable assistance. Most important truths are to be learnt through the science of statistics; and, of course, it would be the duty of such an officer to avail himself to the utmost of that science, for the purpose of eliciting and establishing truths. At present what are called returns are called for in the most wanton way; no pains are taken to specify the form in which the returns are to be

made; they are, therefore, made some in one way and some in another, according to the fancy of each framer of a return; and the consequence is, that great trouble is given, great expense is incurred, and the returns are often useless. They are received, printed, and tossed aside; for few will wade through or study them. All the benefits which would be derivable from such information, if properly prepared, are lost. A minister of justice, if he thought that the statistics of any subject would be useful, would cause proper tabular forms to be prepared before-hand, and printed; and would then require the returns to be made in exact conformity to the forms as printed.

Can it be doubted that the expense of such an office would be amply repaid by the good that it would effect? It was said of the Statute of Frauds, that "every line was worth a subsidy;" and the observation was just, for the due administration of justice, by the encouragement it gives to industry and frugality, is the grand source and creator of that wealth out of which subsidies were paid. Under the present system law reform seems to be nobody's business. If an individual, or a class, suffers under a bad law, they know not to whom to address their complaint. If they go to the Secretary of State for the Home Department, his answer would probably be, "The matter does not lie in my department—it is the Lord Chancellor who is the head of the law: you should make your complaint to him." If they went to the Lord Chancellor, they would not be able to see him. The time of his Lordship is so fully occupied with the ordinary duties of his office, that every minute of the working hours of the day has its appropriate application, and not a minute can be spared for law reform. The present Lord Chancellor once, when in a jesting humour, stated in the House of Lords, that, to his knowledge, the Court of Chancery had sat up the whole of the previous night, for that he had himself gone to bed at half-past four, and the Vice-Chancellor had got up at half-past four to resume his labours. In a former number we stated that Dr. Baillie, when asked how he contrived to get through so much business, said, "Part does itself, part remains undone, some little I do as I can." The part of the

Chancellor's duty which remains undone is law reform. Sometimes the public impatience runs so high, that it becomes irresistible; and the authorities feel that something must be done to appease it; and then the whole subject is referred either to a Parliamentary Committee, or a Royal Commission; and persons are examined who, by a most absurd misnomer, are called "witnesses!" A desultory inquiry ensues—a vast mass of statements are taken down in short-hand, from persons who talk away very carelessly, a short report is made, referring the *curious* to the appendix of "evidence"—in other words, desiring them to find a few grains of wheat in bushels of chaff—and, with little other result, the farce ends. The members of the Committee, or the Commissioners, who probably have learned a good deal, go about their business, their functions superseded, and with no further duty imposed upon them. The mountain has laboured, and brought forth its mouse.

But why this delegation of duty? Why have occasional Commissions? Why a Parliamentary Committee? Why not a regular public servant? Why not a Minister of Justice? The examination should be, not of witnesses—witnesses speak to facts—but rather of written documents. If a person had a ground of complaint, and wished to state it to a Minister of Justice, *vivâ voce*, the answer should be, "put your complaint or your suggestion in writing, get it copied by a stationer in a thoroughly legible hand, and we will examine it." The effect of this would be, that a great number of troublesome people, who, though willing enough to *give* trouble, are very unwilling to *take* it, would be prevented from troubling the office with their crudities; but on the other hand, it would not stop the access of useful papers. The document, when received, would, of course, pass through the hands of clerks and secretaries before it reached the Minister of Justice; and, unless it were fit only for the waste-paper basket, it would at last be regularly labelled, indexed, and recorded for future use. In time a great mass of useful information of this kind would be collected, which would be at the service of each successive Minister of Justice; and the

names of all those who were willing and able to aid in law reform would gradually become known to the Government.

The above supposition assumes that the Minister of Justice would have an office, with secretaries, clerks, and servants, and an extensive library; and it may be said that the expense would be great; but it should be remembered that Parliamentary Committees and Royal Commissions are expensive contrivances also, and that, at all events, the object is of sufficient importance to justify almost any outlay.

We said we would also consider what ought to be the position in the state of the Minister of Justice. Surely he should be a member of the House of Commons. One of the greatest evils connected with the existing system is, that the supposed Minister is always in the Upper House, where he is not accessible to the questionings or remonstrances of the representatives of the people. The Peers are too polite to each other by half. They do not like to say or do anything, which might be deemed rude, and occasionally plain speaking is absolutely necessary. Besides, the evils of a mal-administration of justice fall principally upon inferior people. The Peers suffer little by it. It is not through them, therefore, that the loud tones of indignation will reach the Minister. If there were a Minister of Justice in the House of Commons, there would also be an ex-Minister, and each would vie with the other in endeavouring to show how fully he understood the subject, and how anxious he was to aid in promoting the views of the enlightened.

A great disadvantage in the existing system is, that the supposed Minister of Justice is a person to whom law reform must almost of necessity be distasteful. The prejudices of a Lord Chancellor, a person who has won his way to his splendid position by mastering all the difficulties of a subject beset with technicalities, must be against superseding that system, the difficulties of which he has mastered. His feeling must be to "let well alone." But even if his prejudices were in favour of reform, he must feel averse to it, if, for no other reason, yet for this, that he really has not time accurately to consider the measures, the responsibility of preparing and carrying which he will have to bear.

Another disadvantage of the present system is, that if there happens to be a lawyer, whose inward promptings suggest to him to promote reform, he is often deterred from taking any public step by the feeling, that his interference for the public good is not at all unlikely to prejudice his private interests. Sir Samuel Romilly, the most sincere of law reformers, felt this, but he could afford to disregard it, and did so. So sensible, however, was he of it, that on one occasion he exclaimed in the House of Commons, that he knew the way to Attorney-Generalships and the established honours of the profession, as well as any man. He knew the way, but would not follow it. That way was not by denouncing abuses and advocating reform. But although a man of gigantic talent can afford to take such a course, ordinary men cannot always do this, and cautious men will not; yet it is from cautious men that the most valuable suggestions for reform would probably come. Ordinary men and cautious men will not encounter the hostility, real or supposed, of the head of the law, the great dispenser of legal patronage. If there were a Minister of Justice, unimbued with legal prejudices, — more accessible to, and therefore more under the influence of the representatives of the people, — a member of the House which propels, not of that which retards, — having ample time to consider all projects of legal reform, and to mature all necessary measures, — having constant and easy access to all the accumulated suggestions, to be found in books, pamphlets, and papers, — armed with the right to call for aid from all judges and officers connected with the administration of justice, — bound, by the necessities of his position, to come forward annually with some measure or other of reform, and stimulated to exertion by the feeling, that there was sitting opposite to him an ex-Minister of Justice, ready to taunt him with neglect of duty, and, for aught he knows, ready to bring forward any plan of reform which he may have superciliously rejected — we cannot but think that great public advantages would ensue. We might dispense with Royal Commissions, Parliamentary Committees, and blue books, the Society for promoting the Amend-

ment of the Law might die a natural death, and the complaint might cease to be made, that while everything else was in progress, law reform alone stood still.

We have been induced to recur to the subject of a Minister of Justice, which we touched upon in an early number¹, partly on account of its intrinsic importance, which cannot, indeed, be exaggerated, and partly because two eminent members of the Upper House have lately expressed their sentiments upon it publicly. We wish we could say that they were of one mind, and that the views of both coincided with ours. Unhappily, however, we have the authority of the distinguished author of that admirable and entertaining work, "*The Lives of the Chancellors*," against us:—

"The new House of Lords (says he) has been adorned with an emblazonment of the armorial bearings of all the Lord Chancellors and Keepers of the Great Seal, who have presided on the woolsack since the end of the reign of Edward III. This is a proper compliment to an order which includes many great names, and through a long succession of ages has been the main support of the hereditary branch of our legislature.

"I hope that the line may be continued with increasing reputation to distant generations. In any speculations for abolishing or remodelling the office of Chancellor, I wish Benthamites to consider whether, *as it has subsisted since the foundation of the monarchy, it can be safely dispensed with, or materially altered.* To ensure the steady march of the Government there must be a great Jurist to guide the deliberations of the Peers, and to assist in the councils of the Sovereign; he cannot do so advantageously without the weight to be derived from a high judicial office, and his political functions are incompatible with the administration of the criminal law. The CLAVIS REGNI must therefore be held by

¹ 2 Law Review, 245. The Quarterly Review does us the honour to say, in allusion to the closing sentences of Lord C.'s work, "Lord Campbell evidently penned them after reading a certain clever paper in the Law Review on the scheme of separating the judicial from the political functions of the Chancellor," and the writer goes on to speculate as to the authorship of the article,—not, however, in any unkind spirit. We do not feel disposed to help our contemporary on the point; and we notice the subject only for the purpose of observing that it was always a well-observed rule of chivalry that so long as a knight wore his vizor down his incognito was respected.

the first Equity or Appellate Judge. I will conclude with a prophecy, that if the ~~proposed~~ experiment of a *tripartite* division of the ~~Chancellorship~~ should be tried, it will fail, and that there never will be Seven Volumes filled with "the Lives of the MINISTERS OF JUSTICE." — Vol. vii. p. 724.

The writer of the "Review," we regret to say, supports Lord Campbell's view, but on what is that view founded?—on a supposed necessity that there should always be a great jurist to "guide the deliberations of the Peers," and "assist in the councils of the Sovereign." It is difficult to know what assistance the Lord Chancellor gives in the councils of the Sovereign, for what passes there is a secret, not disclosed to the public; but as to his "guiding the deliberations of the Peers," we are quite sure that that is rather a fancy than a reality. Their Lordships are very apt to decline the guidance of any Chancellor. Indeed, it is their habit to disclaim all submission to his authority. They assert their own independence; and whilst the House of Commons with ready humility bow to the decisions of their Speaker, because he is the creature of their own choice, the Lords decline all such submission, because their speaker is the servant of the Crown. With regard to his Lordship's fears, that after a tripartite division of the Chancellorship, no more volumes will be filled with the lives of the individuals, who may fill one only of the three niches, we think that not improbable. But, with our reforming propensities, we would rather read a short and modest account of one reforming Minister of Justice, than seven volumes of the lives of those, who, after a long enjoyment of all those opportunities of doing good, which the occupancy of the marble chair gave to those who sat in it, left the Court of Chancery the "nuisance" they found it.

But if the opposition of so formidable an antagonist as Lord Campbell is a cause of deep regret, the appearance of such a supporter as Lord Langdale is a source of corresponding delight. His Lordship's evidence, when examined before the Fees Committee of the House of Commons, on the 7th of February last, is full of the most valuable matter. It ought

to be written in letters of gold, and circulated in all directions, for it contains the most admirable principles, most clearly developed. To that part of his evidence which relates to the method of remunerating the inferior officers of Courts of Justice, and the best mode of maintaining their diligence, without resorting to the odious stimulants of the fee system, we shall take the earliest opportunity of recurring. We will conclude for the present with some extracts from his valuable evidence on the subject before us.

"1427. *Chairman.* The question of securing the efficiency of the officers seems to divide itself into two branches, the appointment and promotion and removal of officers, and the supervision of the duties of the office? — Yes; I think that a superintendence over the officers and the whole establishment is continually wanted; you want a proper person who may go about making inquiries and receiving information. My notion is that you ought to have some person connected with the Government who should have the superintendence of the Courts of Justice, just as Government ought to have and exercise the superintendence of all other departments where the most efficient and active service is required. Lord Tenterden once spoke of the Parliament, or of the Government, as "*magnas inter opes inops*;" and when we look at the vast resources of the Government and the small and inadequate means of securing some things equally important to justice and legislation, there seems to be considerable truth in the expression. No steady and regular superintendence is exercised; no machinery for it is provided; the Courts of Justice are left very much to chance; they go on as well as they can. If a complaint is made, that complaint is investigated and dealt with probably in a satisfactory manner, so far as relates to that complaint; but there may be very many causes of complaint *and no complainant*, and no discovery, unless there be a vigilant superintendence and an inquiry made by a proper authority. A cause of complaint detected, and even corrected, is not so fertile of reform as it might and ought to be. MY OPINION IS THAT YOU WANT AN OFFICE OF GOVERNMENT IN WHICH THE AFFAIRS OF JUSTICE SHOULD BE THE PARTICULAR OBJECT OF ATTENTION. You want a person who can at all times be ready to apply himself to the investigation of all things relating to the conduct of officers of justice, and unless you have that, you are and must be without some of the benefits which the Government might well secure for the country."

"1429. *Mr. Hume.* Does not your Lordship think that in this country the appointment of a Minister of Justice, to have under his superintendence the whole administration of the law, high and low, as in several other countries, would be a most important improvement, and that that individual ought to be a member of the Government, with which he could communicate, and to which he would be responsible? — That is my opinion, that there ought to be some person, whom we should call here not by the name of Minister of Justice, but whom we might name, without any prejudice to our usual habits, the Secretary of State for the Affairs of Justice. You might have such a Minister, who might be charged with the whole superintendence over the establishment and organisation of the Courts, their official arrangements, and everything belonging to them, except matters judicial.

"1430. Would your Lordship consider that such an officer should have periodically, annually for instance, reports from the chief of each peculiar Court of its proceedings and progress, and any peculiar circumstances that might arise; would that be the best mode, or is there any other mode which your Lordship would suggest to enable such an officer to become acquainted with the departments placed under him? — I can hardly venture suddenly, though it is a subject to which I have often attended, to go into anything like a detail; but my opinion is, that the supervision should extend even farther than the question seems to suggest. A supervision of that kind should have in view two objects; the one, the discipline, management, and official arrangements of the legal and judicial departments; and the other, distinct from, though closely connected with the first, the collecting and arranging of all that sort of information which is requisite to enable the Houses of Parliament to legislate with prudence and caution."

"1491. Does not your Lordship consider it, looking to the magnitude of business done in the Masters' Office, one of the most important points to be attended to without delay? — I do; but then I must return to a subject I before mentioned: you want a Secretary of State for the Affairs of Justice. I must be allowed to say, that Judges have not the leisure, and, in my opinion, are not the persons who ought to legislate even in matters of practice. Important general orders and regulations ought to be framed and sanctioned by another authority, after advising with the Judges, and hearing from them all the suggestions which they have to make, or all the reasons that they have to offer; but it is not their proper function to make the law, even of practice; at present I

know they are the only persons to do it, and upon whom Parliament has imposed the duty by giving the power. For the most part they have been willing to do what they can in performance of that duty, but it takes them away from their more proper business.

"1492. Then it seems to be your Lordship's opinion, that, with a view to an efficient reform, a Minister of Justice is a primary and important step? — It is a most important step. I believe you cannot work out a system of safe and rational law reform without an authority of that kind.

"1493. In all the various Courts? — With reference to all the various Courts. A superintendence over all the Courts, and every branch of the law, is required; everything connected with the law requires to be subjected to proper inquiry and authority, and everything which ought to be laid before Parliament should be laid before it regularly and officially, in order that it may usefully consider what may from time to time be proper to be done, and how best to do it. It is often necessary to distinguish and consider what ought never to be tried without enactment, and what ought rather to be attempted by cautious and vigilantly superintended experiment. Those who consider this subject most attentively will be best aware how difficult it is to make laws or establish rules of practice, how much information is required, and what precautions are to be used, and how necessary it is that Parliament should be constantly supplied with the fullest and most accurate information upon all those subjects which are required for making and improving laws upon a steady and safe principle. I conceive that Parliament has great need of the assistance of competent persons, whose whole attention should be devoted to this subject.

"1494. You consider that the gentleman so appointed would be in continual communication with the heads of the Court, and would hear the suggestions for improvement that might be made, and that therefore he would be the most competent man to bring forward such measures as you have now pointed out? — I think so; I think he is the person to prepare and collect systematically all the information that is necessary for the purpose of improvements being made, and to put that information into such a shape that Parliament may prudently and wisely determine what is proper to be done and how best to do it. But I confess that the subject is too large and too transcendently important for me to venture on this occasion to state at any length the many details, which, in my opinion, require the most serious consideration.

" 1495. It seems to be of importance to know how that sort of superintendence should be brought about? — Parliament may create a competent authority.

" 1496. But there may be some suggestions which your Lordship would wish to make? — I believe that anybody who considers the present state of things, and how much is left to chance; how frequently important Acts of Parliament are passed in such a state that it is almost impossible for the Courts to act upon them; what blunders are continually made in legislation; how it becomes necessary to repeal in one year what has been done in the former year, because it is manifestly erroneous; when we see all this, we must, I think, be of opinion that it is absolutely necessary to endeavour to establish some better mode of proceeding, to provide an authority for the collection of all the required information, and to bring to the rescue all the skill and experience which can be obtained, for the purpose of securing more prudent and careful legislation.

" 1497. It appears to be your Lordship's opinion, that not only would useless and mischievous legislation be prevented, but many abuses now existing would be remedied, by communication with the officers at the heads of the departments? — You ought no sooner to discover a defect, or what appears to be a conflicting course of proceeding, than you ought to report that to the authority, whose duty it should be to consider of a remedy.

" 1498. And he ought to be the Minister of Justice? — I should call him the Secretary of State for the Affairs of Justice.

" 1499. Is your Lordship of opinion that those important duties relating to the administration of justice would be amply sufficient to employ the whole of any individual's time, and that they ought not to be mixed up with other duties? — That is my opinion. I think all which at one time belonged to the Lord Chancellor, in the way of superintending the general course of justice, and all which has since crept into the office of the Secretary of State for the Home Department, or the Treasury, and a great many other most important duties not hitherto sufficiently considered, ought to go into this office. I think that you would have a very laborious and busy office, and acquire something like a hope of improving the law and the administration of justice, upon a steady and prudent plan.

" 1500. *Mr. Wortley.* It should be a high Parliamentary office? — I should describe him as a High Minister of State, whose duty it would be to attend to the affairs of legislation and justice; and

I would not desire any greater proof of the necessity for such a Minister than may be seen by looking at the condition of the several Courts of Law and Equity, and in examining the statutes passed in any year for many years last past. Look at the way in which Acts of Parliament are expressed, and how they have to be interpreted by the Judges, who often toil in vain to find any meaning; and if, in the absence of any constituted authority, or of any person specially charged with the duty, some individual should attempt an amendment of the Act, it is not improbable that the amendment may prove as unfortunate as the Act itself."¹

The Member of the Lower House, who presided in the Committee, when the above distinguished Member of the Upper House was examined, was the new Solicitor-General, Sir John Romilly, and from him the public may justly expect the most sincere advocacy of the most enlightened views. He bears a name of European celebrity, and we doubt not, that he will add to its lustre. He has already, as a private Member of Parliament, advocated the appointment of a Minister of Justice, and when he did so, his suggestion was received by the House with the loudest cheers.

¹ Report of Committee on Fees in Courts of Justice, Session, 1848, No. 153.

ART. VI.—LAW OF RAILWAY COMPANIES.

A Treatise on the Law of Railway Companies, in their Formation, Incorporation, and Government; with an Abstract of the Statutes, and a Table of Forms. By THOMAS CHAMBERS, and A. T. T. PETERSON, Esquires, of the Middle Temple, Barristers-at-law. London: William Benning and Co., 1848.

WHEN the late eccentric Earl Stanhope, at the commencement of the present century, having undertaken to build a vessel which should sail against wind and tide, confidently asserted in the presence of Warren Hastings and a crowded audience, that some who then heard him would see steam navigation established between America and England, the wise few shook their heads, while the foolish many regarded the practical philosopher as an idle enthusiast. Yet one at least of that audience, as we ourselves personally know, lived to witness the literal fulfilment of his Lordship's prediction. Nay, such were the giant strides of science, that before his death the power of steam had been applied with signal success to the purposes of land, as well as of water, traffic; thousands of miles of railway had been constructed throughout the length and breadth of the land; millions of sterling money had been invested in these Cyclopean works; and a system of law, alike novel, complicated, and important, had sprung into existence, to define, as best it might, the unsettled rights and liabilities attaching to railway speculation.

Amid the excitement occasioned by these momentous changes, the attention of the legal profession has, almost as of course, been especially drawn to the laws relating to railways; and accordingly, within the last few years, treatises on the subject, some of considerable merit, others of no merit at all, have been presented to the public by Messrs. Wordsworth, Shelford, Walford, Hodges, Scott, Collyer, and a crowd of other flushed and eager authors. At the end of this list, as being the *last* published, must be inserted the work with which we have headed the present article; and,

without attempting the invidious task of comparing the relative merits or demerits of these numerous publications, we may confidently affirm that Messrs. Chambers and Peterson are entitled to take a high, if not the highest, position among the writers who have enlightened the railway public.

The chief merit of their book consists in its practical character. The arrangement is exceedingly good; the plan is sufficiently comprehensive, but not too much so; the language is clear, simple, and, for the most part, very tolerably accurate; and the table of forms, including nearly eighty in number, will be found highly useful. The man of business, however, will regret to observe, that the statutes relating to Railways are not reprinted in the appendix, and he will probably feel with us, that this defect is only partially remedied by the insertion of an abstract of their provisions. The fact is, that to a treatise on a limited and specific branch of the law, there should always be appended those Acts of Parliament which bear upon the subject. Many persons do not possess the thirty-six ponderous tomes, in the dust of which our statute law lies buried; and even if their shelves be weighed down with such costly treasure, it may be extremely inconvenient to bring the proper volumes into a committee room or a court of justice, ready to be referred to at a moment's notice as occasion may require. The re-printing of the particular statutes at length is all the more necessary, when their provisions are not embodied verbatim in the text, and when, consequently, no slight risk is run, that the author, as *sometimes* occurs in the work before us, while intending to give the substance of an enactment, shall not state the truth, the whole truth, and nothing but the truth. It cannot be too often inculcated that statutory enactments made easy are not always made accurate. The Legislature, when its scribe is a conveyancer, writes at times very strange language; and they, who attempt to translate into sober English some few of the sections of the Railways' and Lands' Clauses Consolidation Acts, undertake a task which we at least do not covet. Even the most simple enactments cannot be expressed in different terms, without

serious danger of misinterpretation; and it can excite no surprise that our authors, having attempted to explain in their own language the intention of the Legislature, have occasionally fallen into error. For instance, at p. 203., we find them thus stating the modes in which questions of disputed compensation must be settled: —

“ Subject to certain exceptions, (to be mentioned hereafter,) the party claiming compensation is entitled to have its amount ascertained either by arbitration or assessment by a jury. The company, however, have no such option, but are bound under the Lands' Clauses Act to submit the dispute to the decision of a jury, unless the claimant signify his desire to have it settled by arbitration; *or unless*, having been so referred, the award of the arbitrators or of the umpire be not made within three months.”

Now on turning to s. 23. of the Lands' Clauses Act, it will be seen that the provisions are not quite so absurd as they are here represented to be. The language of the Act is as follows: —

“ If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions herein-after contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, *or if*, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as herein-after provided.”

Similar inaccuracies will be found at pp. 196, 230, and 231, where the substance of ss. 7, 73, and 74, of the Lands' Clauses Act is intended to be given. While pointing out the errors into which our authors have fallen, it may be worthy of notice that the Act of 6 Geo. 1. c. 18. is thrice

cited¹ as being repealed by 6 Geo. 4. c. 91., whereas in truth that act is not repealed, but only such portions of it, viz. ss. 18, 19, 20, and 21, as relate to bubble speculations. We also find it stated at p. 295, "that a railway company may, if they think fit, and without the consent of any persons, make deviations from the level of the line to the extent in any place of not more than five feet; and in streets and places continuously built upon, of not more than two feet." Now the above proposition thus broadly stated is calculated to mislead; as a railway company cannot vary their levels in this manner, at least without the consent of the Railway Board, if by so doing they increase the gradients not exceeding one in a hundred, ten feet per mile, or the gradients exceeding that inclination, three feet per mile. The Great Northern Railway Company are well acquainted with this law, having last session lost their bill for a communication with Leeds in consequence of its operation; and we are all the more surprised at finding this error in the book before us, as, unless we are mistaken, one of the authors assisted in defeating that measure, and was actually in at the death.

We have said that the treatise is written on a comprehensive plan, and the public will probably recognise the justice of this praise, when they find that the work contains useful and copious information respecting the proceedings necessary for the formation of a railway company, and its incorporation by statute; for the purchase of lands, and the due execution of the works; for the working of the line; and for the government of the company; and that it also fully illustrates the law which regulates the assessment of the company to the poor's rate, and further points out the remedies, whether in equity, at common law, by indictment, or by summary proceedings, which are available by or against the company. Indeed, the only matter connected with railways which is not discussed, relates to the dissolution of companies. It is not easy to understand why this subject was omitted; for although the rules established in our Courts of Equity render the difficulties attendant on the winding up of railway concerns at common law almost insuperable, and although Lord

¹ Pp. 3. 67, 68.

Dalhousie's Act¹, limited, as it is, to companies who entered into subscription contracts before the 3d of July, 1846, and had not then obtained their Act, affords but a partial remedy to an evil of no small magnitude, it would certainly have been highly serviceable to the railway world, had the authors explained and illustrated the operation of that statute, and, by pointing out the defects in the existing law, shown the necessity of adopting some general measure for facilitating the abandonment of all abortive railway schemes.

Turning now to some of the topics of interest which naturally find a place for discussion in a treatise on railways, the first which arrests our attention is the law which governs the liabilities of Provisional Committee-men. And here we cannot help sympathizing with Messrs. Chambers and Peterson, who obviously feel great embarrassment² while striving to reconcile the established doctrines of law, as applicable to partnership and agency, with the recent decisions of the Court of Exchequer. We of course allude to the cases of *Reynell v. Lewis*, and *Wyld v. Hopkins*.³ It was there contended for the plaintiffs, at least the Court so understood the argument, "that the relation of co-Provisional Committee-men constituted an association of quasi co-partnership, in which one was agent for the other, for the purposes of all preliminary proceedings necessary to enable them to obtain an Act; or, that the fact of their being co-promoters of the scheme, coupled with the fact that no money was supplied for the expenses of it, was evidence to go to a jury that each authorised the other to contract for these purposes, on his behalf, and that of the other promoters." To this it was replied by the Court: "We think that no such consequence follows as a matter of law, from the mere fact of the defendant agreeing to be a Provisional Committee-man. Such an agreement amounts to no more than a promise that he would act with other persons appointed, or to be appointed, for the purpose of carrying some particular scheme into effect. * * * Such an intended association constitutes no agreement to share in profit or loss, which is the characteristic of a partnership.

¹ 9 & 10 Vict. c. 28.

² See pp. 31—45.

³ 15 M. & W. 517; 4 Rail. Cas. 351, S. C.

* * * The truth is, the agreement to become a Provisional Committee-man means neither more nor less than what the words express: viz., an agreement to act on the Provisional Committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme. If, afterwards, the Provisional Committee-man does act, he is responsible for his acts." The Court then proceed to consider the effect of inserting the name of the defendant as a member of the Provisional Committee in a published prospectus; and they add:—

"If such prospectus has been so publicly circulated, with the defendant's consent, that the jury would presume that the plaintiff knew of it, or if the plaintiff has had it shown to him at or before the time of making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must of course depend upon the terms of each particular prospectus. If the prospectus state merely the names of the Provisional Committee, and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of that Committee in fact, he cannot become so by the representation of the fact."

Now, in the passages of the judgment just cited, it certainly appears to us (we say it with all reverence), that the Judges of the Exchequer have committed three capital errors. First, they have confounded the actual being, with an agreement to become, a Provisional Committee-man; secondly, they deny that any distinction exists with respect to liability, between being a Provisional Committee-man, and holding oneself out to the world as filling that character; and thirdly, they have applied the doctrine of profit and loss, which is a proper test of partnership in matters *inter se*, to disputes between the members of an association and strangers. In order fully to comprehend the effect of these errors (as we venture to call them), it must be borne in mind that the defendant in each of the cases under discussion had authorised his name to be inserted and published in a prospectus, as one of the Provisional Committee; that the plaintiffs were respectively suing for advertisements inserted, and plans and sections engraved, subsequently to such publi-

cation; and that the jury had found as a fact, in each case, that the plaintiff gave credit on the faith of the defendant's name. The question therefore was, not whether a person agreeing to become a Provisional Committee-man was responsible in law for the expenses necessarily incurred, but whether a party who was actually on the Provisional Committee, with his own knowledge and consent,—who held himself out to the world as sustaining that character,—and on whose credit the goods had been supplied and the work executed,—was responsible. It may then be perfectly true that no such liability “follows as matter of law, from the mere fact of the defendant agreeing to be,” or as the Court elsewhere express it, “agreeing to become,” “a Provisional Committee-man;” and yet the defendants, in these cases, may have been liable. Indeed, if the Judges were right, and *here* we think they were, in stating that “an agreement to become a Provisional Committee-man means an agreement to act on the Provisional Committee, in carrying into effect the preliminary arrangements for petitioning Parliament for a bill,” then the *actual being* a Provisional Committee-man is *an acting* on the Provisional Committee for those purposes; and we scarcely need the authority of the Court for saying, that “if a Provisional Committee-man *does act*, *he is responsible for his acts.*”

Should this, however, be considered as too refined an argument, we are at least entitled to contend, that, when a man holds himself out as being a Provisional Committee-man, the world is justified in concluding that he is discharging those duties, which the Judges tell us a person undertaking to become a Committee-man promises to perform. And, therefore, although one *may* be on the Committee without acting, and if his appointment be kept secret, he may also avoid all liability by taking no active part in the concern; yet, if he openly declares his appointment, and others act upon the faith of that declaration, a presumption of law, or at the very least a strong presumption of fact, is raised, that he is either personally, or by means of an authorised agent, doing whatever is necessary to promote the scheme with which his name is connected. In this view of the subject

it matters not whether he be a member of an actual co-partnership or not, and the doctrine of profit and loss is wholly inapplicable. The existence of an agreement to share profits and losses may render a *latent* partner liable to a creditor of the firm; but the non-existence of such an agreement cannot shield an *ostensible* partner.¹ This last is liable,—and precisely the same principles apply to all persons associated for the purpose of effecting one common object,—because he has induced the public to believe that he is so, and because the public have acted on that belief. It is an immutable rule of law and justice, that whenever one of two innocent persons must suffer from a false confidence reposed in a third, he, who has been the cause of that false confidence, must bear the consequences²; or, to adopt the language of Lord Denman in a well-considered case, “when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”³

In applying these principles, let us pause for one moment to consider what objects the original concoctors of a railway scheme had in view, in persuading men of rank and wealth to enrol themselves as Provisional Committee-men, and to suffer their names to be published to the world. The objects were clearly two-fold. First, to induce the public to take shares in a scheme, which was promoted by such influential parties; and next, to lead the engineers, the advertising agents, the stationers, and all those persons whose services were necessary prior to the passing of the act of incorporation, to perform those services on the credit of the published names. Had the doctrine propounded by the Court of Exchequer after the panic of 1845, been deemed to be the law in the previous years, who would have lent their time, and labour, and talents towards the promotion of the several undertakings, and the

¹ See *Wagh v. Carver*, 2 H. Bl. 246.

² See Story on Partnership, § 64.

³ *Pickard v. Sears*, 6 A. & E. 474. See also *Gregg v. Wells*, 10 A. & E. 98.; *Harrison v. Wright*, 13 M. & Wels. 820.; *Taylor on Ev.* 564. et seq.

completion of the preliminary measures? It is idle to say that the Provisional Committee-men themselves did not intend to incur any liability, in the event of the respective schemes being discountenanced by the Legislature. In the first place, such a statement, in a great number of instances, would not be true. The Provisional Committee-men knew full well that they would be entitled to no trifling degree of patronage, and to a large number of shares; and they had a shrewd suspicion that if all went well, these shares would realise their nominal value, and *something more*, in the market. They could not, therefore, have supposed that all these advantages were to be showered down on them without some countervailing responsibility; and, in point of fact, they did not, in general, entertain such views. But even if they had formed such an opinion, their position in law would have remained the same. Who ever heard of a trustee or executor being allowed to shelter himself from a legal demand by asserting his individual notions of irresponsibility? The question is not, and cannot be, what the Committee-man thought, but the sole points to be ascertained are, what the creditor had a right to think as a reasonable man, and actually did think. Now, we contend that, in the cases under discussion, the plaintiffs had a right to conclude that the defendants were liable, and the jury actually found that they had formed that conclusion. When parties associate together to effect an illegal purpose, the acts and declarations of each in furtherance of the common design are evidence against his fellows. Surely, then, the agency which is sufficient to fix a party with criminal, should have at least an equally binding effect, where the object is to establish his civil, responsibility. It may have been expedient to protect from ruin many of our West End friends, and some of our West End enemies. On this point we offer no opinion. It did not, and could not, form an element in the judgment of the Court. They had to deal, and we wish to deal, simply with the legal question. In point of law we think that the Judges were wrong, and we venture humbly to submit the above observations to the profession and the public, as embodying the reasons on which our opinion is founded.

Another topic of general interest connected with the law of railways is that which relates to the rights and obligations of a company as carriers of goods.

On this subject our authors thus express themselves : and we quote the passage at length, as it affords a fair example of their usual style.

“ The common-law liability of carriers for losses and injuries occurring in respect of goods conveyed by them, attaches the moment the goods are entrusted to their charge, and continues until they are delivered into the hands of the party to whom they are consigned ; and in the case of a railway company which have made themselves carriers, even though the final place of destination be not upon their own line of railway, and the loss or damage occurs after the goods have been safely delivered to another railway company, to be forwarded to the consignee. Thus, where a parcel, directed to a party in Derbyshire, was delivered at Lancaster to the Lancaster and Preston Railway Company, whose line extended only to Preston, and they delivered it safely to another company, they were held responsible for it ; Rolfe, B. telling the jury in his summing up, that if a party brought a parcel to a railway station, knowing at the time that they only carried it to a particular place, and they received and booked it to the place to which it was directed, without limiting their responsibility, by express agreement, to a part only of the distance, that is *primâ facie* evidence that they undertake to carry it to that place ; and the Court of Exchequer, on motion for a new trial on the ground of misdirection, confirmed that view.

“ The duty of a company to deliver, and their responsibility for the proper and safe delivery of goods received and booked by them to the place of their destination, will, however, depend on the general usage and course of their trade. If they have adopted the practice of collecting and delivering goods for one party, they may be compelled to do so for another ; but if the course of trade has been to carry only from terminus to terminus, they cannot be compelled to deliver. It is a general practice for common carriers to contract with a railway company to carry for them, and in such cases the liability of the company ordinarily extends no further than between the termini of the line or lines of railway along which the goods are to be carried, the carriers undertaking the collecting and transmission of them to the company's warehouses, and the forwarding and delivering them to the consignees. In any such case the carrier is, so far as the company are concerned, the consignor at one end of the line, and the consignee at

the other, and the safety of the property in the interval is all that the company are responsible for. A railway company transmitting goods along their line under such a contract are not common carriers in relation to the individual owners of the goods, nor responsible to them as such for any loss or damage which may arise during the journey, but are to be regarded in law as the servants of the carrier to whom the property is entrusted; and to whom the common-law liability will attach, whilst the company will be liable over to him for negligence or defaults. Under these circumstances the company would only be responsible to the owner of goods in a case in which the carrier was exempt, and for the consequences of their own neglect or misconduct.”¹

In explaining the mode of electing directors, the authors observe that, “if the prescribed number of shareholders be present at a meeting, and a majority dissent from an election, or protest against the candidate, but vote for nobody else, *it would seem* that the election by the minority is good.”² In support of this doubtfully expressed proposition, *Oldknow v. Wainwright*³ is cited, but had reference been made to the late important decision of *Gosling v. Veley*⁴, all doubts upon the subject would have been cleared up, and the rule might have been enunciated as decided law.

We had intended to have enriched this article by extracting some valuable suggestions thrown out by the authors, with respect to the advantages derivable to a railway company by obtaining complete registration under the Joint Stock Companies’ Act⁵; to the powers granted to the owners and occupiers of lands adjoining railways, of communicating therewith by means of branch lines⁶; and to the rights and liabilities which attach to principals and brokers in effecting the transfer of shares⁷; but our limits will not allow of any further quotation, and we now take leave of the work in the confident expectation that it will live to see a second edition, and in the no less confident hope that, by dint of a *little more* care and attention, it may *then* become, if it be not already, a *highly valuable treatise on the Law of Railways*.

¹ Pp. 345—347.

² P. 425.

³ 2 Burr. 1017; 1 W. Bl. 229, S. C.

⁴ 7 Q. B. 406, 437.

⁵ Pp. 83—88.

⁶ P. 322.

⁷ P. 474—485.

ART. VII.—THE INNS OF COURT.

1. *Report of the Proceedings before the Judges, as Visitors of the Inns of Court, on the Appeal of A. HAYWARD, Esq., Q. C., 1847.*
2. *Remarks on a late Decision of the Judges as Visitors of the Inns of Court.* By CHARLES NEATE, Esq., Barrister, 1848.
3. *History of the Inns of Court and Chancery, 1847.*

Sir Frederick Thesiger — May I ask whether your lordships consider this a public court or a domestic forum?

Lord Denman — A domestic forum.

Hayward's Case, p. 102.

WE preface our remarks with this quotation, in order that it may be at once perfectly understood, that we draw a wide distinction between judges sitting *in curia*, and judges sitting *in camera*. Towards both we hope that we entertain all due respect; but the degrees of respect are regulated by the *quantum* of reason addressed to our understandings. It rarely indeed happens, that a judgment in open court fails to satisfy our minds; for the judges then openly and argumentatively declare not only the foundation, but the steps and courses of their judgments — especially when they differ. As each states the reasoning on which his opinion is founded, they convince us, in the first instance, that the opinions are formed in perfect good faith, as relates to the mind of each judge; and then we are enabled, by our knowledge of the texture, and (we may venture to add) the bias of each mind, to contrast the reasons and the motives, and generally to come to something like a sound conclusion as to the validity of the decision.

It is not so when the judges sit *in camera*; and when they assemble as a *forum domesticum*, we may permit ourselves to doubt, whether domestic affections, domestic regards, the love of "*comfort and harmony*," may not have had an influence in the conclave, which would never have been admitted in the court. Nor is this feeling diminished in a case, where (as in that of Mr. Hayward, and generally in all others relating to the government and conduct of the Inns of Court) the majority of the judges have been themselves members of the Societies, of which the administration is called in question. Such is our respect for the judges, that we should scarcely have ventured upon the expression of this latter doubt, if the learned counsel who conducted the cause for the barristers of the Inner Temple had not himself raised it, by appealing to the judges themselves as accessories before the fact, to the very injustice of which the petitioner before them was complaining. "I would call," says *Sir Frederick Thesiger*, "your lordships' attention to a few of the names of the individuals who have distinguished our Bench, who have sanctioned (by concurring in) this mode which is now made so strong an objection to the proceeding of the benchers. My lords, there were Lord Bathurst, Lord Keeper Henley, Lord Harcourt, Lord Thurlow¹, Lord Ellenborough, Lord Redesdale, Lord Abinger, Chief Baron Richards, Baron Graham, Baron Gurney, Mr. Justice Burroughs, Lord Langdale, my Lord Chief Baron Pollock, Mr. Justice Creswell, Mr. Justice Erle, Mr. Baron Platt, the late Mr. Justice Williams (I am sorry to use that expression towards him), and Mr. Justice Coltman — I beg pardon. — At all events, we have this comfort, that though we may be misrepresented — although, in other quarters, we may be unfairly, and I think I may add, unjustly assailed — we have the satisfaction of knowing that many of the honourable and distinguished persons before whom we appear, know perfectly well that, in the course which we have

¹ Lord Thurlow, at any rate, did not concur in another rule, on which we shall have occasion to comment; for it appears in the case of *Rosslyn and Jodrell*, that he had resisted the payment of the dues claimed by the Society.

adopted, we are confirmed by the practice of the Society, and sanctioned by the time during which that practice has existed." (p. 141.)

To my Lord Chief Justice Pollock — to Mr. Justice Creswell — to Mr. Justice Erle — to Mr. Baron Platt — to Mr. Justice Coltman, this *tu quoque* must have been a strong appeal; they might, it is true, have answered, and we somewhat wonder that they did not answer, in their own justification, — "We knew, indeed, that there was such a rule, as we knew that there was a rule against long beards; but we thought its application obsolete; and we as little dreamt that any member of the Bench would avail himself of it, for the vindication of his own private animosities, as that our hall should be mistaken for a synagogue."

The fact, however, is, that of eleven Judges who signed the resolution against the petition of Mr. Hayward, five had been the colleagues, and continued to be the intimate associates, of the parties complained of; and that of the remainder two, at least, had been benchers of another inn of court, which, as we shall show hereafter, asserts the right of arbitrary exclusion from the bench.

We can afford to admit, that these considerations did not actually influence the judgment *in camera*; but we are entitled to insist that they do furnish reason for wishing that such a judgment should have been accompanied by some argument as to its foundation; and that they lay the judgment itself open to greater freedom of observation, than might have been decorous towards the more solemn decree of an open Court.

On re-consideration, we doubt whether we have not gone a little too far in denominating the document, put forth as the conclusion of Mr. Hayward's case, as a judgment; perhaps it is only an expression, and a very weak expression of opinion, not matured into judgment.

The very first point in dispute, for instance, is only disposed of parenthetically. The counsel for the Benchers had denied the visatatorial power of the Judges. It might fairly have been expected that the Judges would have vindicated their right by a special assertion, that they were visitors;

and would have indicated to the junior members of the profession, that there existed a power to which they might appeal in any case in which they might find themselves aggrieved by the conduct of the Benchers. If, for instance, improving on their fiction of absent commons (against which Lord Ellenborough has decided that there is no remedy at law), the Benchers were to provide no dinners at all for the bar and students, would the fifteen Judges assemble in Serjeants' Inn to determine, whether bread and salt gave an inchoate right to beef and pudding; and to how much, and of what quality, and if not, why not? — Let us see how a single Judge, sitting at *Nisi Prius*, disposed of such a question, and then calculate what redress a party grieved would be likely to obtain from the fifteen Judges assembled *in camera* at Serjeants' Inn, and at what cost — even if the exigencies of the public service would allow of their being so assembled. “Lord Ellenborough,” says Sir F. Thesiger, “is supposed to have laid down this proposition in the broadest terms—that was the case of the bond given by Mr. Joddrell, and the suit was in that bond for absent commons, and different fees which were due from him; and Lord Ellenborough says, ‘Sitting here, I am not prepared to enter into a calculation of pounds, shillings, and pence, and to determine whether too much money is raised by the Benchers, or whether the money which is raised be misapplied. If there be any abuse, apply to the twelve Judges; they are the proper visitors of the Inns of Court, and they will give redress.’”

“I must be permitted to say, *pace tanti viri*, it was a hasty expression. His Lordship was annoyed at having all these items paraded before him. I do not wish time to be wasted here by considering these items of pounds, shillings, and pence; if there be any abuse go to the Judges.”

Pace tanti viri, indeed, if this were the process of judicial reasoning! — “because the thing is too trivial for the consideration of *one* judge, occupy *twelve*!” The practical conclusion, however, from such an argument is sufficiently clear — there is no practical remedy. Once, in half a century, a rich man, like Mr. Joddrell, may have the trouble, vexation,

expense, and obloquy of disputing petty extortion — once, in half a century, an active, ambitious man may insist on his call to the Bar, even though he has made enemies of the leaders of his profession by an exposure of the abuse of official fees — once, in half a century, an agitating clerk may aspire to be admitted as a student; but for the smaller abuses, the petty vexations of a brief authority, the benchers has the same indemnity as the cabman, though in a greater degree; the sum or matter in question is too small to fight about, and their subjects submit to imposition, rather than incur the trouble and expense of litigation. The benchers have this further advantage over the cabman, that it costs above five pounds to get out of their Society.¹ They have exacted a bond, for their own benefit, as the price of a public function. The king must not sell justice; but the benchers may sell the right of practising in Courts of Justice — and spend the money in “*comfort and harmony!*” If the attorneys have a right to complain that they are taxed for the maintenance of the state, may not the Bar object that they are mulcted for the dinners of the benchers? But *de minimis non curant* — the tax only becomes oppressive when it is accompanied with injustice or insult; — and this injustice is irresponsible power, this insult is exclusion. The benchers levy the tax as they please, exempt whom they please, spend it as they please, furnish no account, submit to no audit — *stet pro ratione voluntas* — self-elected, they fear no scrutiny. Do they fear the visitors? — do they fear the judges? — read the opinion in Hayward’s case, and answer the questions. “They, the judges,” *strongly recommend!* Would they have dealt so with a corporation? Would they not have said, “This bye-law is unreasonable, and we cannot too severely reprobate a system, under which the private feelings of a single individual can be permitted to control the exercise of a public trust? — we cannot conceal from ourselves that the refusal of the candidate to violate the law is the real cause of his exclusion from this corporation; if Mr. White

¹ Fees on leaving, 2*l.* 19*s.* 2*d.* : ditto to *bullers* (!) 2*l.* 10*s.* 0*d.* ; petition and order, 4*s.* 6*d.*

had refused explanation to his adversary, and had invited or compelled him to resort to the miscalled code of honour, Mr. Black would have had no pretence for opposition — having received satisfaction (as it is called), he could have taken no ulterior step. We, sitting as judge, cannot shut our eyes upon the fact, that the omission to fight a duel is the real cause of Mr. White's exclusion; and, in the fullest confidence that the majority would not have concurred in so unreasonable an objection, we hold that any rule by which less than a majority shall decide the question of admission is invalid. We will give this corporation a short time for the revision of this bye-law: if it is not amended before the first day of next term, we must see that justice is done." — These, or some such words, we are convinced, would have been used, if the case had been *in curia*, between John White and the Corporation of Little Pedlington. Why the result has been so different, in the petition of Abraham Hayward against the benchers of the Inner Temple, we have already hinted. Perhaps the Judges will be the first to desire the establishment of some more effective visatatorial power — a power which will not subject them to the unpleasant necessity of sitting in judgment on the acts of their constant associates — power which will not require the attendance of a majority of their body, already sufficiently occupied in more important duties — above all, a power which shall exercise its functions openly, and give openly the reasons of its judgments. By the latter provision we shall be spared the necessity of comparing the strong indications of opinion, elicited during the course of the argument, with the exceeding tameness of the all but impotent conclusion. But, whatever may be the visatatorial power, we are convinced that some change must be made in the constitution of the government of these Societies. Self-election has ceased to be fashionable; the courts of the City Companies and the benchers of the Inns of Court cannot long remain the exceptions — especially as neither goldsmiths, lawyers, fishmongers, or merchant-tailors appear to have greatly forwarded the interests of their respective crafts by their convivial associations. The taxed must have some voice in

the amount and purposes of taxation. Accounts must be submitted to audit. We say *must*; because the course of public feeling is leading irresistibly to similar conclusions in all similar cases. As soon as the power of the benchers is seriously assailed, it must fall; timely concession may prevent the necessity for hostile attack; the first concessions have already been made — slowly and reluctantly on the part of some — still they have been made; and with them the implied confession of past malversation. It has been admitted that dinner is not the only object of legal association, though it may be an important auxiliary to legal studies. For be it observed, that though we cannot recognise the pretension of the benchers to be considered a mere convivial club, we do not deny the uses of conviviality; we would rather extend them; we would carry "*comfort and harmony*" from the highest seats of the judicial bench to the outer seats of the junior bar — every rank, every gradation should have its place. We can see no good reason why the Equity Judges are excluded from "*the comfort and harmony of Serjeants' Inn*," or some similar association — some college of justice, where those who are intrusted with the administration of the law in all its branches may meet and convivially talk over its merits, its defects, or its exigencies. It is for the public benefit that such interchange of ideas, such mutual correction of error, such communication of knowledge, such suggestion of amendment, as arise at the dinner table, should take place among public functionaries. Many men will give a most useful hint over their wine, who will shrink from the obtrusion of propounding a project — even a chancellor might learn something from a companion, which would never reach him through a secretary. High medical authorities agree that food is more easily digested in company — the solitary steak is less quickly assimilated than the social round; and so it is with the mind — the scholar who has bolted black-letter all the morning will find his mental chymification wonderfully assisted by cheerful intercourse in the afternoon with men of similar studies. We do not, therefore, ridicule the dinners of the Bench, not even their "*exceedings*;" but we protest against their exclusiveness —

their clubbishness — their class selection — their class proscription. For this reason we advocate the rule, which is said to have been adopted by one of the Societies, that for every call *honoris causa*, there should be another by reason of seniority. Not, indeed, that seniority which summons a colonel of militia from his country seat to the government of a law society, but one which, discriminating among the seniors of the profession, might call a Bentham to the council chamber, before age and infirmity had rendered him incapable of attending. For this purpose we propose that on every alternate vacancy, the ancients of the bar (say all practising barristers of ten years standing, who have kept a certain number of next preceding terms,) shall present three candidates, one of whom shall be elected by the Benchers. This would be no great concession of popular franchise; but it would break up the system of irresponsible self-election. "*Comfort and harmony*" would be in no danger; the most popular men at the bar-table would be presented to the Benchers, as their future associates; there is small risk that unfit men would ever be so presented, for who would consent to be so put forward, under the risk of repeated rejection? The Bench would cease, indeed, to be a close corporation of King's Counsel; but the Crown would have a new guide, in the suffrage of the profession, to the exercise of its patronage.

It is somewhat curious, that practically, and with very rare exceptions, the honours of the law are elective. But the electors are the attornies! The popular advocate polls his briefs, and the Chancellor returns him to a seat within the Bar. But would it not be advantageous that the Bar itself should have some vote upon the occasion? There are personal, social, and moral regards, which ought to have their weight; and these are more likely to be known to a man's associates than to his clients; he may be perfectly fit in all that relates to learning, tact, and diligence; but he may be perfectly unfit in temper, manners, and habits: he may be eloquent, but rancorous; witty, but revengeful; his memory equally stored with cases and resentments; no man more persuasive to a jury, none less conciliatory to a colleague. Is it for the public interest that these qualifications should

be examined? Is it for the individual interest that they should be determined, not by rejection, but by the milder course of non-selection?

But it may be objected that this would inconveniently increase the numbers of the Bench: the King's Counsel alone have become a very numerous body; and Sir Frederick Thesiger (with what degree of propriety, we leave the ex-officer of the Crown to re-consider) says, "it is not impossible that times may arrive when the Crown, by creating a great number of gentlemen to be King's Counsel, might get complete dominion over all the Societies." Our answer is, that if the number be inconvenient, it may be limited — the candidates may wait, as the new bishops now wait, till there is a vacancy, care being first taken that no place be occupied by a non-effective, however ornamental his title may look upon the list of benchers, while a working member is excluded. The honour, in respect of which a seat at the bench-table should be claimed, should be honour obtained in the forensic race — by a chancellor, but not by a mere chancellor of the Exchequer — by a speaker, but not by a mere speaker of the Commons. When high political persons have been practising barristers, and had not attained the Bench previously to their higher promotion, as in the case of Lord Dumferline, they may be just exceptions; but the election of the late Mr. Canning and others can be justified on no professional grounds. — The benchers chose them as members of their club!

Ancient writers have denominated the Inns of Court as a Law University. Such, indeed, they should, but such, indeed, they have not been for some centuries. The reader, who may seek amusement in contrasting what was with what is, will be assisted in his search by "The History of the Inns of Court and Chancery," by Mr. Pearce. The writer is somewhat of an optimist, and occasionally provokes a smile by his laudation of the institutions of which he is the historian. We certainly were amused when we read, "At the present day the study of the law is pursued, firstly, by silent study in the libraries of the Inns, which are furnished with every work necessary to make an expert lawyer." Many years

have certainly elapsed since we were in the habit of frequenting any of the libraries; but we most gratefully remember their most comfortable solitude. At two of them, at least, the librarian was not even a lawyer, from whom the student could derive one particle of information in aid of the objects of his inquiries, but a clergyman, whose salary, as chaplain, was eked out by the emoluments of the office of librarian.¹ In fact, legal study had long ceased to be even the avowed object of the Inns. Let us hope that it will become so, not for students only, but for all of all ages; for who, numbering the years of mortal man, can say, "*I know the law?*" In respect of books, also, those libraries which we have frequented are very imperfect; and in works on foreign jurisprudence, we may venture to say, scandalously defective. The four collections united might, indeed, make a magnificent university library of English law; and if the sale of duplicates were applied to the purchase of foreign works, that branch also might be, at least, respectable.

It appears to us that the proper scheme of a legal University should include every class of persons engaged in the administration of the law according to their several grades; and having that subordination which is maintained in similar institutions. The Inn, like the College, having its interior discipline; but the Inn, like the College, being subject to the control of the University. Would there be any difficulty in constituting a society composed of all the judges, high judicial officers, and even benchers, to which the duty of general government might be intrusted, and which would take special care, that every member of its body had, and maintained, his proper place. As at Oxford or Cambridge, a seat at the Fellows' table is a necessary consequence of taking the degree of Master of Arts; so at Lincoln's Inn, whoever should be called to any higher degree, state, or office, than that of a barrister, would *ipso facto* become a member of the Bench without any form of election. "*The comfort and harmony*" of the council chamber would be as little endangered, as the conviviality of the combination

¹ It is fair to say that the library of Lincoln's Inn is now a very good one.
— Ed.

room; for in each, an unpopular member would quickly find that his own comfort would be best consulted by abstaining from a society in which his presence had proved disagreeable; but he would have had his trial; and his judges would have had the satisfaction of knowing that their opinions, and their conduct, had been founded not on their prejudice, but on their experience. We may take another exemplification: an officer obtains a commission from the Crown: is he *elected* a member of the mess? by no means; he *must* join it; yet, though the harmony of the mess is very rightly considered by the military authorities as an essential, and a test, of good discipline, the indiscriminate admission of every young gentleman, honoured by her Majesty's commission, has never been considered as likely to endanger it. Officers, it is true, have been sent to Coventry by their mess, — some for a time, some permanently, — the latter being a very usual prelude to retirement from the service; so a circuit mess may pronounce its opinion of the conduct of an offending barrister; so the Bench of — has dealt, and all the benchers may deal, with an offending bencher. Not necessarily by expulsion; but by that conventional and constructive exclusion, to which ninety-nine in a hundred will submit without a murmur, while about an equal proportion would resist, by choice or necessity, a formal trial and sentence.¹

We contend, therefore, that the *veto* claimed by the Benchers on the nominations of the Crown, is not necessary to their "*comfort and harmony*," even if those considerations could for one moment be allowed to weigh against the much higher objects involved in the important duties confided to their charge. But if we contend thus for the right of the Queen's Counsel, we take yet higher ground when we assert, that all persons appointed to high judicial office ought immediately to become Benchers of their respective Inns; and we have little doubt but that such was the ancient practice; a relic of which we find in the fact, that the Recorder of London, though only elected by the corporation, is called

¹ We have heard of an officer being hinted out of a regiment by always finding a vacant chair to the right and left of him. This is a practical ballot from which any dissentient may manifest his protest by taking a particular seat.

honoris causa to the Bench. It is true that the Judges of the superior Courts of Common Law are now uniformly made Serjeants, as incident to their elevation, and few, if any, barristers have stepped at once from behind the bar to a judicial seat in equity; but there was a time when every common law Judge was not of necessity of the degree of the coif; and, therefore, not being of necessity a member of Serjeants' Inn, must, we presume, have become a benchers of his own society. Indeed, this seems to be implied in the arguments of Sir F. Thesiger, who in strenuously denying the visitatorial jurisdiction of the whole body of Judges, admits that the Benchers were in the habit of submitting to the authority of the Judges who were members of their own respective Inns. Now, as the Serjeants, who are made Judges, are tolled out of their Inns, we conclude that Benchers Judges may be here referred to.

But as the changes of the times have removed this class, so others have arisen, and will arise; new judges and new judicial officers have been, and will be, created; and though each new creation will be accompanied by the accustomed jealousy, and by the accustomed struggle to dispute its position, public order requires, that the proper place of all persons administering the law should be ascertained and established. We happen to live in a land of precedence,—in a land where the majority of the people do yet attach some considerable value to order, and (its cause and consequence) subordination. The Chancellor does not think it ridiculous to maintain his precedence of the Archbishop of York. The House of Lords did not think it ridiculous to entertain a question of pre-audience between the Lord Advocate and the Attorney-General. The legislature did not think it ridiculous to preserve by special enactment the precedence of the judges of an abolished court.¹ The late Prince Regent did not think it ridiculous to regulate the pre-audience² of the Attorney-General and the King's most ancient serjeant! Why, then, are commissioners and masters to be charged with a ludicrous ambition when they assert their rights to a place in society, and especially

¹ Stat. 7 & 8 Vict. c.

² Letters of the Prince Regent, 14th Dec. 1814.

in professional society, corresponding to the position which they hold in the state?—why is this to be laughed at as a question of turtle and venison, or a contest for the right of first taking a lady from the drawing-room to the dining parlour? Is it not, as much as any other, a question of social subordination?

We will take, first, the case of the Masters in Chancery; as their contest with the benchers dates from a period antecedent to the existence of the commissioners of the Court of Bankruptcy, though, as we shall show hereafter, their position as officers of the Crown is a little more recent.

Masters in Chancery were, however, officers of the Great Seal long before the creation of King's Counsel, as that rank now exists; but they were only assistants to the Chancellor; they sat with him on the Bench; their inauguration was the public presentation of a hat, as a sign of superior dignity; but their salary was low—only six hundred a year; and, up to the time of Lord Macclesfield, at least, their extra emoluments were supposed to be tainted with some irregularity: for these latter reasons the seniors of the bar were in the habit of looking down on the associates of the judicial bench, and the benchers of the Inns of Court repudiated their society. The rule, however, was accompanied by this anomaly, that while the benchers held that a mere master was not a fit associate for them, they did not deem it any derogation of their own dignity to accept a mastership! as soon as they found (as we suspect a majority of the Silks find now) that their fees as advocates were likely to fall short of the salaries of masters. At this moment six out of eleven masters have been Queen's Counsel, one of them Attorney-General, and another has also the reserved dignity of a judge of the abolished Court of Review in bankruptcy; and yet the five other gentlemen, who have stepped, we will say, *per saltum* from behind the bar, are deemed unworthy to dine with the juniors of their own office, who, according to the high pretensions of the Silks, must be deemed to have degraded! The Masters in Chancery are now officers of the Crown (stat. W. 4.). How long, then, will the associates of the judges, actually themselves exercising high judicial duties, be deemed

inferior to advocates who only *nominally* enjoy the honour of being counsel to the Queen ?

We take next the case of the commissioners of the Court of Bankruptcy, whom the benchers of three of the Inns (the question not having yet arisen at the fourth) have refused or omitted to call to the Bench.

In the year 1831 Lord Brougham, the then Chancellor, introduced his bill for the establishment of a Court of Bankruptcy: "The proposition," said his Lordship, "which I have to submit to your Lordships, is to appoint *ten judges*, or commissioners, if you so please to call them, of the Bankruptcy Court." And afterwards, in characterising those persons, he observed, that they would be "high and dignified officers, connected with a most extensive and important branch of the law." Lord Lyndhurst, who opposed the measure, speaking of the intended judges or commissioners, said, "These are not persons who are to have other duties, and to perform other business,—no; they are to be permanent *judges*, holding their situations *on the same footing as the judges in Westminster Hall*,—here there are ten new judges." Again, in the House of Commons, and in answer to questions put by Sir C. Wetherell as to the intended position of the commissioners, Mr. Serjeant Wilde said, "The bill expressly says, that the judges and commissioners are to have all the rights and privileges, and are to be precisely on the same footing with the judges of the courts of Westminster Hall;" and the Attorney-General, the present Chief Justice, added, "The judges and commissioners are put exactly upon the same footing." After these most clear and unequivocal declarations in parliament, made by men of such high authority, the statute passed, and it would be difficult to imagine stronger words than those employed to express the intentions of the legislature:—"And the same Court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a Court of Record, or judge of a Court of Record, and all *other* rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed

by any of His Majesty's courts of law or *judges* at Westminster."

The letters-patent of King William the Fourth *appear* to carry out this intention—"And we do further give and grant to the said Judges and Commissioners rank and precedence in all our Courts of Law and Equity in manner following, that is to say, to the chief Judge of the said Court, for the time being, rank and precedence next after the Puisne Judges of our Courts of King's Bench, Common Pleas, and Exchequer, for the time being respectively, and to the other Judges of the Court of Bankruptcy, for the time being, rank and precedence next after our said chief Judge of the said Court, for the time being, and to the Commissioners of the said Court, for the time being, rank and precedence next after our said other Judges of the said Court, for the time being." This "keeps the word of promise to the ear," yet the law officers of the Crown, themselves, be it observed, parties interested in the question, have put an interpretation on the letters-patent which renders the royal grant a delusion: and the practical result is, that the Commissioners (the surviving branch) of the Court of Bankruptcy are excluded from professional society—are excluded from the Bench of their respective Inns, for no other disqualification than having accepted a high and dignified office which three-fourths of their practical excluders (we do not count the peers and privy councillors) would jump at, — which no inconsiderable number have anxiously solicited.

The Court of Bankruptcy, as originally constituted, consisted of two king's counsel and two serjeants, as judges of the Court of Review, and of one king's counsel and five barristers of the outer bar, as commissioners. As to the chief judge, as he had been made a privy councillor, there was no question; the three other judges expected precedence among the benchers or serjeants, and the five commissioners deemed that they were entitled, *honoris causa*, to be called to the Bench—all were disappointed. It was discovered that the words of the patent granted precedence to the judges and commissioners "in all our Courts of Law and Equity," the usual words, "in all places and upon all

occasions," having, accidentally or intentionally, by negligence or by jealousy, been omitted. On this paltry distinction, the benchers resolved to exclude the commissioners; and we suppose that, if any one of the judges had been selected from the outer bar, they would have excluded him also. We call the distinction *paltry*, because the benchers should have known, and if they did not, the Attorney-General, then one of the Bench of Lincoln's Inn, would have told them, that the omission of these words did not operate as an exclusion of general precedence; he might even have added, that they had been omitted as surplusage; for that in the instance of the office which he himself held, much slighter words than those contained in the letters-patent of the Court of Bankruptcy, and in a much inferior instrument, had conferred on him general precedence. The Regent's letter, dated 14th Dec., 1814, gives the Attorney and Solicitor General *pre-audience* (not precedence) over "the two ancientest of the King's Serjeants at Law" in Courts; in consequence of which, at the funeral of Queen Charlotte, and at the coronation of his late majesty George the Fourth, they took precedence accordingly.¹

Our most decided opinion is, that the association of all persons holding high public office should, upon public grounds, be encouraged and secured. We would advocate such association even where there was no existing institution for its furtherance; but where there are established colleges, we protest against the exclusion of any, who, by their confidential, nay, convivial conference, might combine for the amendment of the law. How many absurdities, anomalies, and contradictions in our colonial laws, for instance, might have been reformed, if the retired judges from India, and

¹ After considerable contest, the commissioners established their right to walk, and did walk, after the Attorney and Solicitor General at the funeral of the late king, thereby, *pro hac vice*, establishing their precedence. But it is said that the Solicitor-General having put in a protest, in which he declared that the commissioners had no official rank whatever (had he read the patent?), the Earl Marshal declared that the precedent should be without prejudice. The commissioners subsequently challenged discussion by a petition to the Crown; but the law officers have never allowed them an opportunity for the argument.

other possessions, had been uniformly associated with the leaders of the bar, and higher officers of the Bench, who, from their higher seats in Parliament, might promulgate the information which they had gained at the dinner-table. Lincoln's Inn has done tardy justice to one *ex-judge*: but how many remain excluded!

We have dwelt so long on the constitution of the Bench, that we have little space for the consideration of the position of the bar in the legal Societies. It cannot have escaped notice, that while "comfort and harmony" are the key-notes of the song of the benchers, — while the *Silks* are permitted to remain a social club, — no such regard is extended to the bar, either by the benchers or the visitors. The student is admitted to have an inchoate right to his call, and consequently to his place at the bar-table, however unpopular, however obnoxious he may be. The benchers assert a right to impose an untried associate on the bar, though they deny the right of the Crown to select a companion for themselves. Here there is no question of "comfort and harmony," none of numbers, none of convenience. A few bar-seats are provided, — if these be full, the last comer, though he be an *ex-Chief Justice of Calcutta*, must *battle* with the students! — he may get no dinner, but he must pay; they have it in the bond! This utter disregard of the comfort of others, contrasted with the most jealously anxious care for themselves, constitutes no very amiable feature in the case and conduct of the benchers. We have no doubt that nineteen-twentieths, or even a greater proportion, of that exalted body would individually repudiate these and other illiberalities; but while claiming to be a club, they have one quality of a corporation — collectively they have no conscience!

But while we thus record our objections to the malversations of the Societies, we are ready to admit that the evils of the system have been generally of a negative character; there has been as little of positive mischief as of positive good in the administration of our Law University. Degrees have been more frequently carelessly granted than unjustly refused. If one candidate for admission as a student has been rejected on the ground of political libel, a student charged

with habitual calumny on private character, has had his call to the bar facilitated by the extraordinary grace of the benchers. This story, as we have heard it, runs thus:—there was in former times a monthly periodical entitled “*The Satirist*.” No paper of modern times, bad as some of them have been, has exceeded this work in habitual scurrility, scandal, acrimony, or falsehood; but it was high church, ultra loyal, and thorough Tory! Its three editors were designated as “*Manners without polish, Hook without point, and Best so bad that the less said of him the better.*” One of these presented himself at the bar table to perform his exercises; now be it remembered that the justification for retaining this absurd ceremony is, that the twelve appearances before the bar facilitate the recognition of any person who by his previous character or conduct has rendered himself unfit to be called. So thought the barristers on this occasion, and they refused to hear Mr. —’s exercises: he appealed to the benchers, they sympathised with the loyalist libeller, and themselves heard the exercises! We tell the tale as ’twas told to us, and we confess that we participated in the doubt expressed by the narrator, whether Mr. — would have met with equal favour if his transgression had been against the other side. We dwell on this case, because, if true, it shows that political feeling may influence a body composed for the most part of political aspirants; of men who have received and are expecting the favour of the crown. If it were proposed that the crown should have the nomination of the bar, the proposition would be unequivocally rejected; that it should be nominated by the nominees of the crown, the king’s counsel learned in the law, would be the next gradation of evil; but that there are other respects which practically countervail.

It is not the tactic of the benchers to be unpopular; their “*exceedings*” would fall short if they deterred men from entering their society; their policy is to open the valves as widely as possible in one direction; the absent commons of the many pay for the dinners of the few; the hundreds who are called, and then are heard of no more (except when the steward from time to time reminds them of their dues) con-

stitute the revenue of the voluntary society. It costs 5*l.* 13*s.* 8*d.* in one lump to get out, and numbers submit to a long course of annual payments in the vain hope of some future equivalent on the part of their taxers, rather than *petition* to be permitted to withdraw from their unproductive and unilateral contract. In this, at least, the benchers show themselves able financiers; they know that small payments from many ~~are the~~ best sources of revenue. The tax may be the most unjust, the most absurd, the most unequal that has ever been levied, from the *non olet* of the Roman emperor, to the *olet* of the pestilence-breeding window tax; but it is only four or five pounds a year, and who will litigate four or five pounds even before a judge who never has had an interest or a prejudice on the question?

Thus it is that the constitution of the Inns of Court have escaped reform. No one has hitherto taken sufficient interest in the subject, to insist on its consideration. The attention of parliament has been two or three times drawn to it; but if the matter was pressed, as in the case of the rule at Lincoln's Inn to exclude reporters from becoming students, the benchers have yielded rather than provoke inquiry. On another occasion, to which we have drawn attention in a previous number, the late Lord Abinger, upon Mr. O'Connell's motion in the House of Commons, did not hesitate to assert that the *whole* of the property of the Societies was the result of subscriptions among themselves, which had been handed down from one set of trustees to another, and was in fact as much private property as that which belonged to any gentleman in the House! This statement passed unquestioned! The fallacy—we do not trust ourselves with the more appropriate word—was conclusive with the House, which for obvious reasons, not yet sufficiently sifted by charity commissioners, has a strong inclination to confound trusts and property. But if it had been true, it proves too much: the contributions were not voluntary; they were raised under the compulsion of an extorted bond. The rule in corporations is absolute; the rule in clubs is conventional, that no greater rates shall be levied than are necessary for the purposes of the institution: there is no hoarding. If the benchers of the Temple have applied

the revenue of the land granted to them by the charter of James the First, to their own private purposes, granting themselves chambers *rent free*, instead of applying them to the uses of the grant, they have committed a breach of trust. If they have taxed the junior members, beyond the annual necessity, to make up the deficiency, — yet more, if to make a hoard for their own purposes, they have been guilty of gross dishonesty. It is scarcely possible that the fallacy can be again repeated. Will not the next appeal to parliament induce an inquiry into the revenues of the Inns of Court and their application? To facilitate this most desirable end, we again quote the opinion of the Common Law Commissioners. “That case” (*Rex v. Benchers of Lincoln’s Inn*) “considers the Inns of Court as placed upon the footing of other voluntary societies, with respect to the admission of members. Without presuming to question the correctness of this decision in point of law, we may be permitted to remark that, in point of expediency, the ordinary immunities of a voluntary society ought not to be allowed to any body of persons claiming to be the medium of admission into one of the learned professions. If the body is to enjoy this privilege, *it is no longer a private association, but one in which the public has a deep interest*, and the proceedings of which, if not adapted to the purposes of general utility, *ought to be made so by the interposition of law.*”

We had proceeded thus far when the pamphlet of Mr. Neate reached us. We need scarcely say that we fully concur in his views on Mr. Hayward’s case; and therefore we cannot do better than conclude this article with two or three extracts from his bold and able exposure of the injustice to which his friend has been subjected.

“The great question contested between the parties, and which seems to have kept all others in the back ground, was that of the jurisdiction; which again divided itself into two, the first, whether the benchers of the Inner Temple were subject to any visitatorial power extending to the act complained of; the second, in whose hands that power resided. The necessary existence of some such power in some hands was too plain to be denied, though there was a disposition to question even that. But, in the absence even of

all precedent and custom, an association so far private that it had neither foundation nor rule of government in any charter or statute, and yet claiming and exercising important public functions,—such as that of defining and constituting the qualification of barristers, and by consequence of Judges; administering too, though not in strictness or of legal title possessing, funds granted by the crown for charitable, that is, for public purposes, must of necessity have been subject, in respect of its privileges and its property, to some supervision and control; and as it wanted in strictness of law that corporate quality, and in some respects also that public character which would probably have subjected it to the jurisdiction of the Queen's Bench, exercised in the form of mandamus, it followed that the jurisdiction applicable to the case must be of a visitatorial nature. Legal analogy, as well as obvious convenience and right, still apart from precedent, would have pointed out the Judges as the proper persons to exercise such a power; not only by reason of their connection as superiors with the inns of their own courts, but because they were, and still continue to be, founders of those societies in the only shape in which they practically exist, namely, as societies endowed with the right of conferring a qualification for the bar, in which respect they were and are the creatures and delegates of the Judges." (P. 12.)

"Was it not within the province, if not within the duty, of visitors to remind the delinquent body of the obligation they would be under, to repair the mischief which had arisen from their own wrong, and to restore Mr. Hayward to the benefit of that position from which he had been thus unduly driven? Such, indeed, was probably the meaning and expectation of the Judges, if we may take as an index of their feeling the expression by the Lord Chief Justice of a wish on the part of the Judges generally 'that the benchers should consider whether or not they would continue that bye-law, and *maintain what had been done by reference to that bye-law.*'

"But with all the experience they had of the spirit of the Bench, exhibited as it was before them in the language of their first counsel, and still more in their choice of a second, was it right to leave any thing to their unfettered justice? Or was it worth while for themselves, as Judges, to assert their power as visitors, at so great an expense of time and learning, and then to use it to such little purpose? What they did was really little more than *airing their jurisdiction*: it was but to take it down, like an old volume, from the shelf on which it had sometime been forgotten,

to wipe away the dust from its cover, and then restore it to its place, almost without opening its leaves.

"We at least, in this university where I now write, have a far more serious, a more awful notion of the power and efficiency of a visitor than this appeal is likely to convey." (P. 32.)

"So far, indeed, from the decision as to the rule, and the incidental suggestions of the Judges as to the claim of Mr. Hayward, having produced any impression in his favour on the minds of the benchers, they seem more than ever determined, while they abandon the bad bye-law, 'to maintain that which they have done by a reference to that bye-law.' If, indeed, I was to say of the benchers, judging only from their own acts, that the consciousness of the wrong they had done was but a reason with them for continued wrong-doing; that the just remonstrance of Mr. Hayward, the most eloquent and impressive, and yet most temperate, arguments first of Lord Chief Justice Wilde and then of Mr. Serjeant Talfourd, enforced as they were by the very forbearing and considerate reproof of the Judges, had left nothing on their minds but the impression of a quarrel to be kept up, a defeat to be resented, —the charge, though in accordance with the facts, would hardly to that extent be supported by them alone. But what other construction can be put on the avowal of Sir F. Thesiger, made after the appeal, in a letter to Mr. Hayward: 'after what has occurred, I cannot think that the *comfort and harmony* of the Bench would be promoted by your introduction amongst us.'" (P. 39.)

"Let them (the benchers), if they will, absolve themselves from the performance of functions no longer applicable to *these* times, but let them not forget the duties that belong to *all*. Let them do as little as they like, but let them do that little well; let them remember at least in all they do the ancient dignity of their office, the general purpose of its institution, and those unvarying obligations of justice and of courtesy which bind them to the Bar from which they spring, whose privileges it is their part to maintain, and whose honour is in their keeping. But if they should see nothing whatever in the traditionary powers which they exercise but the means of securing their own ease; nothing in the venerable edifices committed to their care but a comfortable place to dine in; if, in their dealings with the Bar, they should make themselves parties where they ought to be judges; and if, acting in that character, they should throw aside, not only that generosity in which is the justice of gentlemen, but those common notions of fair play which, in this country at least, are the boast of humbler

men ; if, having once entered on such a course, they should doggedly persist in it, in spite of the remonstrance of their brethren and the rebuke of their superiors, — they would do well to remember, though we may not provoke the interposition, that, if the visitors to whom they are subject should fail to give redress, there is above the Judges a legislature, and beyond the legislature the public.

“ The public, indeed, engrossed as they now are, and almost lost in the contemplation of events so novel and so vast, have little care, it may be thought, to bestow upon the wrongs of an individual ; and yet at no time, more than now, would it behove us to mark carefully what is done amiss in high places, what is defective in old establishments. Let those, at any rate, whom it may concern, be well assured that what I have written on my own responsibility and my own mere motion, is by no means the expression only of my own sentiments : there are many, both in Westminster Hall and out of it, who already think what I have said. Those out of the profession are likely even to go still further. Not knowing, as we do, how much the proceedings in this case are at variance with the prevailing spirit and temper of those who profess the law, — the habitual firmness and decision of those who administer it, they will be apt to think and to say, judging only from this instance, that nowhere is justice less respected than among those who trade in its name ; by none is the good name and honour of their fellows so lightly dealt with as by the chiefs and leaders of that which lays claim to be the highest and most honourable of liberal professions ; and that never is the power of a visitor so feebly exerted, or so safely despised, as when it comes to the performance of its task encumbered, rather than armed, with the collective wisdom and majesty of the Judicial Bench.” (Pp. 43–45.)

P. S. — While this article was in the press, our attention was drawn to the following paragraph, which, *mutatis mutandis*, we recommend to the profession.

UNIVERSITY REFORM. — The following is the copy of a memorial to the First Lord of the Treasury, now in course of signature in both Universities. “ The memorial of the undersigned graduates sheweth, that the present system of the ancient English Universities has not advanced, and is not calculated to advance, the interest of religious and useful learning to an extent commensurate with the great resources

and high position of those bodies. That the constitution of the Universities of Oxford and Cambridge, and of the Colleges (now inseparably connected with their academical system), is such as in a great measure to preclude them from introducing those changes which are necessary for increasing their usefulness and efficacy. That under these circumstances, believing that the aid of the Crown is the only available remedy for the above defects, your memorialists pray, that your Lordship will advise Her Majesty to issue her royal commission of inquiry into the best methods of securing the improvement of the undergraduates of Oxford and Cambridge." A meeting of the memorialists, it is understood, will be held in London in May. — *Globe*.

ART. VIII.—SUB REGE SACERDOS. *Comments on Bishop Hampden's Case, with an epitomised Report of the Proceedings.* By E. S. CREASY, M.A., Barrister-at-Law, Professor of History at University College, London, late Fellow of King's College, Cambridge. London: Taylor and Walton. 1848.

"TIMES change, and we change with them," says the Latin Poet. The case forming the subject of the able and well-timed pamphlet which heads this article illustrates the position well. Change indeed! from the negative orthodoxy of the last century, of the Church and King men, with its fondness for old port, and a quiet rubber at whist, and its instinctive dislike of Methodists and Dissenters, to the new orthodoxy of our so-called Anglo-Catholics, of the men who seek to undo the great work which the Reformation began,—to substitute once more implicit obedience to the dictates of an external authority, in the place of the recognition by each man of a divine con-

science, of a principle within him, making him a "law unto himself,"—to reconstruct, in the nineteenth century, the edifice, raised by the progressive thought of the first twelve ages of Christian history, undermined by the advance of thought in the four centuries which followed, and of which the very ruins are fast disappearing from the most earnestly thoughtful portion of our modern world—the orthodoxy which would fain have forced into the reluctant hands of the late venerated successor of Augustine the powers at which Becket grasped, and which Cranmer disclaimed.

It does not in general fall within our province to notice—nor is it on the present occasion our intention to do more than notice—the tendencies of this system; tendencies at which, as the advocates of progress and free thought, we, be it said in passing, feel no alarm, satisfied as we are that the results of its introduction will be widely different from the anticipations of those who are seeking to introduce it. It is probably only by having the logical consequences of the admitted system of orthodoxy placed clearly before their eyes, that the English public can be brought earnestly to inquire what is the foundation of that system itself. But when the influence of these new theories manifests itself on the bench; when we see it leading, and, as we believe, greatly misleading, two of the Judges of the highest common law court of the kingdom, both men of high ability and great learning, to declare that the act of parliament under which, for three hundred years, the appointment of the Bishops of the Church of England has been considered to be vested solely in the Crown, has not the effect attributed to it by universal belief; that it gives the Crown, in fact, little more power of appointing these high dignitaries than it had before that act passed, except so far as its Archbishops may prove more "squeezable" than the Pope; we cannot remain indifferent spectators of the contest. We purpose, therefore, as far as in us lies, both to bring clearly before the public the real question in dispute, and to smooth the way for further legislation in support of the long prevalent practice, if such legislation should be considered desirable, by laying bare the

unsubstantial nature of the ingenious subtleties through which that practice has been assailed.

The facts out of which these observations arise—the election of Dr. Hampden as Bishop of Hereford; the absurd formality on the confirmation of that election, at the church of St. Mary-le-Bow, of first citing all opposers, then refusing to hear them when they appeared, and ultimately declaring them contumacious for not appearing; the application to the Queen's Bench for a mandamus to compel the Archbishop to entertain, by his Vicar-General, objections to an act which he had already done, and, so far as appears, had no power to undo; and the divided opinions of the Judges of the Queen's Bench as to the propriety of granting the mandamus;—all these circumstances are so recent, and must be so fully in the memories of our readers, that it is needless to do more than allude to them. Assuming them, therefore, as known, and passing over all considerations but those directly bearing upon the constitutional question to which we have adverted, we proceed at once to its consideration.

The form of appointing all English Bishops, even to the sees founded by Henry VIII. after his breach with the Pope, is regulated by a statute passed in the 25th year of his reign, c. 20. This statute recites another statute passed two years before, prohibiting the payment of annates or first-fruits, which it declares “to have been taken of every archbishopric or bishopric within this realm, by restraint of the Pope's bulls, for confirmations, elections, admissions, postulations, provisions, collations, dispensations, institutions, installations, investiture, orders, holy benedictions, palls, or other things requisite and necessary to the attaining of their promotions;” and providing that “if any person should be delayed from a bishopric by reason of bulls apostolic, he should be consecrated here in England by the Archbishop of the province;” and it then proceeds as follows :

Sect. 3. “Forasmuch as in the said act it is not plainly and certainly expressed, in what manner and fashion Archbishops and Bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the King's dominions, be it now enacted, &c., that the said act, and every thing therein contained,

shall be and stand in strength, virtue, and effect; except that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the see of Rome, to or for the dignity or office of any Archbishop or Bishop within these realms, or in any other of the King's dominions; nor shall send or procure there for any manner of bulls, breeves, palls, or other things requisite for an Archbishop or a Bishop; nor shall pay any money for annates, first-fruits nor otherwise, for expedition of such bulls, breeves, or palls."

The act goes on to provide that,

"At every avoidance of every archbishopric or bishopric within this realm, or in any other part of the King's dominions, the King, our Sovereign Lord, his heirs and successors may grant to the prior and convent, or the dean and chapter of the cathedral, churches, or monasteries where the see of such archbishopric or bishopric shall happen to be void, a license under the great seal, as of old time hath been accustomed to proceed to the election of an Archbishop or Bishop of such see; with a letter missive, containing the name of the person they shall elect and chuse," whom, "and none other," the act requires them, "with all speed and celerity, in due form to elect and chuse" accordingly.

The fifth section enacts that,

"If within twelve days after the receipt of the license and letter missive, the dean and chapter elect the person mentioned in the letter missive," the election "shall stand and be good and effectual to all intents," and "the person so elected, after certification made of the same election, to the King's Highness, his heirs or successors, shall be reputed and taken by the name of the lord elected of the said dignity and office that he shall be elected to;" and after he has taken the appointed oath of fealty "to the King's Majesty, his heirs and successors, the King's Highness, by his letters patent, under his great seal, shall signify the said election, if it be to the dignity of a Bishop, to the Archbishop and metropolitan of the province, where the see of the said bishopric was void;" or, if the see of the Archbishopric be void, "to any other Archbishop within this realm, or in any other the King's dominions, *requiring and commanding such Archbishop, to whom any such signification shall be made, to confirm the said election, and to invest and consecrate* to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome, for the same in any behalf."

If the vacancy is of an archiepiscopal see the requisition and command are to be addressed to one Archbishop and two other Bishops, or else to any four Bishops within this realm, or any other of the King's dominions.

These are the provisions of the statute if the letter missive is complied with within twelve days after its receipt. If, however, the parties to whom this letter is addressed "defer or delay their election above twelve days next after such license or letters missive to them delivered, and for every such default," the act provides (sect. 4.) that

"The King's Highness, his heirs, and successors, at their liberty and pleasure, shall nominate and present, by their letters patent under their great seal, such a person to the said office and dignity as they shall think able, and convenient, for the same."

The nomination and presentment are to be made to the same persons to whom the mandate requiring the confirmation of the election, if an election had been made, would be addressed; and it is enacted,

"That whensoever any such presentment or nomination shall be made by the King's Highness, his heirs or successors, by virtue and authority of this act, and, according to the tenour of the same, *the Archbishop and Bishop* to whose hands any such presentment shall be directed, *shall, with all speed and celerity, invest and consecrate the person* nominated and presented by the King's Highness, his heirs and successors, to the office and dignity that such person shall be presented unto, and give and use to him a pall, and all other benedictions, ceremonies, and things requisite for the same, without suing, procuring, or obtaining hereafter any bull, or other things at the see of Rome, for any such office, or dignity, in any behalf."

By the sixth section it is provided, that

"Every the person and persons being hereafter chosen, elected, nominated, presented, invested, and consecrated to the dignity or office of any Archbishop or Bishop within this realm, or within any other the King's dominions, according to the form and effect of this present Act," shall be clothed with all the rights and power belonging to the office."

The seventh section is as follows:—

"And be it further enacted, by the authority aforesaid, that if

the Prior and convent of any Monastery, or Dean and Chapter of any Cathedral Church, where the see of an Archbishop or Bishop is within any of the King's dominions, after such license as is aforesaid rehearsed shall be delivered to them, proceed not to election, and signify the same according to the tenour of this Act, within the space of twenty days next after such license shall come to their hands" (the additional eight days beyond the time within which the election is made being apparently allowed for the transmission of intelligence that the election had taken place); "or else, if any Archbishop or Bishop within any of the King's dominions, after any such election, nomination, or presentation shall be signified unto them by the King's letters patent, shall refuse, and do not confirm, invest, and consecrate, with all due circumstance as is aforesaid, every such person as shall be so elected, nominated, or presented, and to them signified as is above mentioned, within twenty days next after the King's letters patent of such signification or presentation shall come to their hands; or else, if any of them, or any other person or persons, admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process, or act of what nature, name, or quality soever it be, to the contrary or let of due execution of this Act, that then every Prior, or particular person of his convent, and every Dean and particular person of the Chapter, and every Archbishop and Bishop, and all other persons so offending, and doing contrary to this Act, or any part thereof, and their aiders, counsellors, and abettors shall run into the dangers, pains, and penalties of the estatute of the provision and præmunire, made in the twenty-fifth year of the reign of King Edward III. (Statute 5. cap. 22.), and in the sixteenth year of King Richard III. (cap. 5.)"

These statutes were intended to prevent the purchase at Rome of bulls conferring abbacies, or priories, or directing the translation of bishops to other sees; and derive their name from the first words of the writ of *præmunire facias*, one of the modes by which the penalties imposed by them were to be enforced,

"In manner as was ordained in other statutes of provisors, and others which do sue in any other court in derogation of the regality of our Lord the King. (16 Rich. II. c. 5.)"

The dangers, pains, and penalties referred to are, according to the last cited statute, that the parties themselves,

"Their notaries, procurators, maintainers, abettors, fautors, and counsellors be put out of the King's protection, and their lands and tenements, goods and chattels forfeit to our Lord the King; and that they be attached by their bodies, if they may be found, and brought before the King and his counsel, there to answer to the cases aforesaid; or that process be made against them by *præmunire facias*."

It is upon the construction and effect of the statute stated above, and more especially of the provisions for the confirmation of any election made under it, that the controversy in this case turns.

Now one thing, we think, must appear clear to any person who applies himself to ascertain this point, simply from the consideration of the statute itself,—namely this, that, whatever duty the Archbishop may have to fulfil in confirming an election under that statute, it is *not* that of inquiring *whether the person recommended by the letter missive of the sovereign is qualified to be elected or not*. Even if the consequence of such an inference were, that the function of "confirmation" must be a mere form, this result could not be very startling, when applied to a statute, which, while it prescribes the form of "election" as the mode of appointing the new bishop, provides that the electors shall choose the person named by the sovereign, and "none other," under such penalties as we have stated above. But the inference of the absolute inutility of confirmation does not seem to be a necessary result of the proposition with which we set out. Room seems certainly left for inquiry, whether the election has been made "in due form," as required by the statute. Nay, such an inquiry is not only not inconsistent with its provisions, but appears to be a duty cast by it upon the persons to whom the office of confirming the election is assigned, in order that the sovereign, if the election be irregular, may present to the vacant see such person as he "shall think able and convenient for the same." But that the office of confirming an election under the statute, cannot throw upon those to whom it is committed the duty of inquiring into the qualifications of the person recommended by the sovereign appears to follow, both from the enactment

that if the electors elect [the preceding section requires us to supply "in due form"] the person mentioned in the letters missive in that behalf, the election "shall stand good and effectual to all intents," though unconfirmed; and still more clearly from the provision made for the case of a neglect of the electors, for twelve days after the receipt of the license and letter missive, to make "such election," the election (that is to say) of the person recommended by the sovereign. For in that case, as we have seen, "the king, his heirs and successors, *at their liberty and pleasure*," are empowered by letters patent to present to the vacant see "such a person *as they shall think able and convenient* for the same;" and every Archbishop and Bishop to whose hands such confirmation shall be directed is, "with all speed and celerity," to "invest and consecrate" the person so presented; but the "confirmation" disappears altogether.

Now, to suppose that the Legislature intended to throw upon the persons to whom the office of confirming the election of a bishop is committed the duty of inquiring, if need be, into the qualifications of the person selected by the sovereign to fill a vacant see, if the electors *acceded* to that recommendation, but not to do so, precisely when there would be the greatest occasion for inquiry, namely, if the electors should be so dissatisfied with the person recommended as to incur the penalties of *præmunire*, by *refusing* to elect him, is to make a supposition so extravagantly unreasonable—while the contrary supposition, namely, that confirmation is omitted in the latter case because, as there is no body of electors interposed between the nomination by the Crown and the presentation for consecration, there can be no room for doubt whether the royal intention has been duly complied with, is so natural, and agrees so well with the rest of the statute,—that we cannot conceive that any fair interpreter, looking to the words of the statute only, could avoid adopting it.

If, therefore, any right can be supposed to be vested in the Archbishop of calling in question the royal nomination, it must be one to be exercised on the investiture or consecration of the new Bishop, and not on confirming his elec-

tion. But it does not require very profound learning to ascertain, and in the present case it was not disputed, that, of the four ceremonies—election, confirmation, investiture, and consecration—to which the statute refers as accompanying the appointment of a Bishop, the two latter were, at the time when the statute was passed, and are still, only the solemn means of conferring upon a person already selected as Bishop the powers belonging to his office; and that no provision is made in them for any inquiry as to his qualifications for it.

The effect of the statute, then, according to its natural interpretation, is, that all the four functions above mentioned are, in regard to the duties of the persons by whom they are discharged, ministerial only (except in so far as an inquiry into the formal regularity of an election partakes of a judicial character); the two last—investiture and consecration—not indeed by the operation of the statute, but because that law, doing nothing to alter their character, leaves them as it found them—offices in which, however important their nature, or impressive the ceremonies attendant upon them, the officiating person acts ministerially only, going through certain prescribed forms (with which the person to be invested or consecrated is of course bound to comply), but having no right to do any thing more;—the two first—election and confirmation—because, by the operation of the statute, the duty of selecting who shall be elected and confirmed has been cast upon the Crown.

Accordingly, from the time when the statute passed down to the present day, this has been the interpretation uniformly put upon it. Within fourteen years after it was passed, in the 1st Edward VI., the preamble of an act intituled “An act for the election of Bishops,” recites that,

“The elections of Archbishops and Bishops by the Deans and Chapters, within the King's Majesty's realms of England and Ireland at this present time, . . . be in very deed no elections, but only, by writ of *congé d'eslire*, have colours, shadows, or pretences of elections, serving, nevertheless, to no purpose, and seeming derogatory and prejudicial to the King's prerogative Royal, *to whom appertaineth the collation and gift of all archbishoprics and bishoprics*, within his Highness' said realms of England, Ireland, Wales, and other his dominions.”

A recital strangely perverse, if the law had then been understood to be that the duty of inquiring whether the person nominated for election by the Crown was duly qualified for the office was cast upon the Archbishop or Bishops by whom the election was to be confirmed.

The same language is repeated in an Irish statute, passed in the 2nd of Elizabeth, under which the appointment to all Irish bishoprics is made at once by the letters patent of the Sovereign; which, it is enacted, are to "stand, to all intents, constructions, and purposes to such and the same effect as though *congé d'elire* had been given, the election duly made, and the same confirmed:" yet the statute takes not the slightest notice of the important alteration which it would have made by dispensing with the ceremony of confirmation, if the duty of the Archbishop, in confirming elections under the 25th Henry VIII. had been to inquire into the qualifications of the person elected.

Blackstone, in his Commentaries, treats the statute in question as having restored to the Crown that ancient right of nomination to a vacant bishopric which the Popes had finally wrested from it in the reign of King John;¹ a doctrine from which none of his numerous and able editors have dissented.

The learned editors of Coke upon Littleton accede to the same view.² "There is not," Mr. Creasy observes, a single writer on English constitutional law, in whom "any vestige is to be found of the constitutionally important theory," resulting from an opposite view of the statute, namely, that "the spiritual peers are selected by the Sovereign not absolutely, but subject to an ecclesiastical veto."³

Lastly, the Archbishops, who have had to act under the statute, have always acted on the same supposition; and though they chose, as we shall show hereafter without

¹ Bl. i. c. 11. p. 380. This right, according to the Bishop of Ossory's case, cited by the Attorney-General, Palmer, 28. e. Croke, Jac. 552. Roll. ii. 101. Fitz. Nat. Bre. 169., consisted, first, in granting the license to elect, and, secondly, in *confirming* the election, when made, on which followed investment and consecration.

² Co. Litt., Harg. and Butler's ed. 134. a. Note 4.
P. 15.

necessity, to adopt a form of proceeding on confirmation, which had the appearance of being intended to try the merits of the candidate for consecration, committed the conduct of it to an officer called the Vicar-General, who does not exercise any contentious jurisdiction¹; and accepted, as the sole and sufficient proof of the qualification of the Bishop elect, the certificate of his election and the letters patent of the Sovereign.²

On what grounds, then, may well be asked, is it that now, for the first time, more than three centuries after the statute passed, a grave opinion is expressed that it has all along been interpreted wrongly; and that, according to its true construction, the persons by whom an election made under it is to be confirmed, have cast upon them the duty of judicially inquiring into the qualifications of the person elected? The arguments of the two learned Judges who have given utterance to this opinion are unfortunately too long to be repeated here verbatim; but we hope to succeed in bringing them fully and clearly in a somewhat condensed form before our readers.³

“From the fourth century, at least,” says Mr. Justice Coleridge, “down to the epoch of the Reformation, we have evidence that the confirmation of a Bishop was regarded by the canon law as a solemn judicial act of the Metropolitan ratifying his election, without which it could not have effect. This much, indeed, was conceded: all that was contended for on the other side was, that there was no ground for admitting this law as part of the common law of England. He thought, however, that this contention failed, and that the decrees of these early councils formed part of the canon law acknowledged in England before the Reformation. It is true that when the Pope nominated to the bishopric confirmation by the Archbishop was needless; and there were some other cases in which confirmation by him did not seem to be

¹ Burn. Ecc. Law, title “Bishop,” article “Confirmations.” See English Churchman, for January 13., page 68., account of the proceedings on the Confirmation of Dr. Hampden.

² Oughton, Proleg. cap. 3. §. 9, 10. Coke, IVth Inst., p. 337. title, “Curia Audientie Cantuariensis.”

³ We refer to the report given in the English Churchman for February 3. compared with that given by Mr. Creasy.

necessary ; but, after making every deduction of this kind, there was a large body of proof to show that the ordinary jurisdiction was in the Metropolitan. Nor could the assumption of the power of confirmation by the Pope be taken to make against the power of the Metropolitan, since the Pope in these matters had not been content with that appellate jurisdiction which he might have exercised with advantage, but had proceeded to vacate sees, to which Bishops had been duly elected, that he might confer them upon creatures of his own, — a wrongful assumption of power, which was rightly resisted."

"Now the statute of Henry the VIII., in construing which we must apply the old rule, regarding not *quid voluit Rex*, but *quid dixit Parliamentum*, appeared to him to have had two prevailing objects: the first, to put upon a true foundation the royal power to nominate Bishops ; the second, effectually to prevent all interference by Rome, as well as to secure prompt obedience to the canons. The lawyers and canonists, who were, no doubt, consulted in framing the statute, probably pointed out the great inconvenience which would arise from any alteration in the old form of proceeding, and any departure from the ancient ceremonies under which certain rights were acquired in the persons elected ; and divines would be unwilling to sever one link unnecessarily from the chain which bound our church in communion to the Christian commonwealth. It was not thought necessary, therefore, to alter the mode of confirmation, which was preserved in its integrity, while the form of election was altered by the introduction of the letter missive. But there was no intention manifested to interfere with the ancient rights of the Metropolitan ; confirmation succeeded election, as previously, and consecration followed ; for the procuring which, in case the Metropolitan refused to perform the ceremony, it was remarkable that the statute made no provision.

"Now the statute spoke of election as a known form ; it prescribed no form ; every thing was to be done as before, except that the letter missive was added. But no qualification was required. The Crown lawyers were, therefore, driven to contend that none was necessary to be mentioned, or that the Crown, as supreme head of the Church, possessed the dispensing power of the Pope, and exercised it by the letter missive, a doctrine against which, as a member of the English Church Catholic, he strongly protested.

"He would not take upon himself to say whether the letter missive did not make the act of election merely ministerial ; and he did not deny that there was great force in the provision, that

the election, though before confirmation, should stand good to all intents and purposes, and the person so elected be taken and reputed as the Lord elect; but, on consideration of what followed, and of the object to be obtained by the statute, he conceived that this must be interpreted as directed against any prohibition or interference on the part of the Pope.

"Then the statute directed that the Archbishop should confirm, invest, and consecrate, the person elected. But it did not direct how he was to confirm, invest, or consecrate. If the Archbishop asked how am I to do these acts? the reply must have been, as you have always done. He was not to be told, on mere implication, you were before this a judge, you are now only a minister; you had before to inquire into the fitness of the person whom you were called upon to confirm, now you have lost that power. These difficulties were removed, if the words referring to Rome were held to qualify the direction to confirm, invest, and consecrate. It could not, then, be objected that the King could make any one a Bishop without reference to his opinions, whether heretical or otherwise, his age, or his canonical fitness,—points in all ages the subjects of judicial inquiry by him on whom was cast the responsible duty of consecration. And could any one, who had read the present order for the consecration of Bishops, which could not be more solemn than it had been in Roman Catholic times, suppose that, in consecrating, the Archbishop was acting in a merely ministerial capacity. Yet, unless consecration could be separated from confirmation, this result would follow.

"From the shortness of the time allowed between election and consecration, it had been argued that the legislature could not have intended opposers to appear, inasmuch as it might take a much longer period to hear and determine upon their objections. But that argument fell to the ground, if the Archbishop was engaged in a judicial act. There could be no doubt that if he was honestly proceeding, without delay, but was prevented by illness, or any other lawful cause, from completing the confirmation within the specified time, that circumstance would be a sufficient answer.

"The name, which in the course of the argument had been applied to the statute, 'The Magna Charta of Tyranny,' would, in his opinion, be perfectly just, if the construction put upon it by the Crown lawyers were correct; not because it cast off the vexatious interference of Rome with a somewhat rough hand, but because it gave to freemen and Christians still to wear the garb of freemen, and to use the solemn ordinances of a Christian ritual, whilst at the same time it imposed an intolerable yoke upon their

conscience; because it commanded the highest officers of the Church to wear the form of judges, with the semblance of an open Court, commanded them to invite opposition, to cite opposers to swear witnesses upon the Holy Gospels, to pronounce a solemn judgment in the name of the Saviour, and yet declared to them that it was all a shadow and a form; because it bound the Archbishop solemnly to invoke the influence of the Holy Spirit, and in the most awful language to confer this inviolable gift upon one who might be a mocking infidel, and to administer to him that right which on the morrow he might abuse, and yet it stripped them of the Queen's protection, forfeited their lands, their goods, and chattels, and cast their bodies into prison, if they refused to perform that ceremony. No infidel could contrive a more blasphemous thing than such a contrivance would be. His consolation was, and it was a great one, that he could not so interpret the statute. He did not believe that under any Monarch the Lords and Commons of England would have been brought to have passed such a law; he could not think that for so many centuries holy men would have been found content to lay upon their consciences so many, and such grievous, burdens. He did not admit that even Henry VIII. would have given his consent to such a law; for, tyrant though he was, he still thought himself a churchman in the highest sense of the word, and gloried personally in the title of Defender of the Faith.

"It had indeed been argued that the act of confirmation was the only material thing, and the form was immaterial. But justice, as well to the Bishop elect, to the Archbishop, and to the church at large, required that such a proceeding as this should be open, and governed by definite forms. All lawyers would agree that it was by form, in Courts of law, that rights became substantially protected. If, then, this proceeding for three hundred years had had a judicial shape, had been carried on in open Court, and parties summoned to make appearance before it, he conceived the Archbishop was bound now to act in compliance with the custom which had so long obtained. Nor did he consider that the total want of instances since the Reformation of the rejection of any candidate who had been duly elected, did more than give the Crown lawyers some ground to stand upon: set against the existence of the form of procedure, it appeared to him altogether untenable."

For these reasons Mr. Justice Coleridge thought that the late Archbishop of Canterbury was wrong in having con-

firmed the election of Dr. Hampden to the see of Hereford, without hearing certain parties who objected to his confirmation, not on the ground of the election having been informally made, but on that of his being disqualified for election on account of the alleged heterodoxy of certain opinions put forward by him in works published many years before.

The reasons assigned by Mr. Justice Patteson, for coming to the same conclusion, were substantially the same with those of Mr. Justice Coleridge, though accompanied by a greater reference to the provisions of the statute.

“In all Christian countries,” said the learned Judge, “in England as well as others, wherever a Bishop was elected, prior to the passing of the 25th of Henry VIII., whether by the people, or the clergy and people, or the clergy as a body without the laity, or by the chapters or convents, the election required to be afterwards confirmed in order to perfect it ; this confirmation was the act of some spiritual superior ; it was a judicial, and not merely a ministerial act, involving an inquiry both into the regularity and sufficiency of the election, and the qualifications and identity of the person elected, and which, as it came after the election by way of review of it, could not properly be said to have been part of the election itself. Such confirmation was obviously most required in the case of a popular election ; but it was important also when the election was confined to a smaller body ; for without the control afforded by it there was great danger of the introduction of unfit persons into the vacant office of a Bishop ; a circumstance which all Christian men would be ready to interfere to prevent. Therefore, when the act of confirmation was to be performed, all persons were cited generally, and those who particularly interfered specially, to state their objections, if they had any, to the person elected. Such citation appeared to have been used in this country from an early period, though the precise date did not appear, but at all events long before the passing of the 25th of Henry VIII., and to have continued to be used down to the present time. Whether it was introduced into this country from the Canon Law he did not think it necessary to inquire ; it was sufficient for the purpose of arriving at a true construction of the statute, that previously to, and up to the time of its being passed, the election of Bishops required to be confirmed by some spiritual superior, whether by the Pope or by the Metropolitan, and that such confirmation was a judicial act.

"Now before the statute of Henry VIII., the elections of Bishops were real, free elections, under a *congé d'elire* from the Crown; which however did not state who was to be elected; there might have been a letter missive sent with it by way of recommendation; but that letter was a mere request, there was no compulsion on the Chapter. The enactment of Henry VIII. had, however, certainly altered that state of things. It enjoined the Dean and Chapter to elect the person named and no other, without reference to the obtaining letters from the see of Rome, and it could not be doubted but that its effect was to destroy the freedom of election altogether, and render it, as it was characterized in the 1st Edward VI. c. 2., and the Irish statute the 2nd Eliz. c. 4., 'in very deed no election, but only a colour, shadow, and pretence of election.' But he did not agree with the character which that statute gave of such an election as "seeming derogatory to the Queen's prerogative, to whom alone appertained the collation and gift of all archbishoprics, bishoprics, and suffragan bishoprics within her Majesty's realm;" for it was plain that previous to, and up to the 25th of Henry VIII., the collation and gift of bishoprics and archbishoprics did not appertain to the Crown, but they were filled up by free election by the law of the realm.

"Now if the statute had provided that the election should be by *congé d'elire* alone, without the letters missive, it could not be doubted that the election, confirmation, and consecration would have proceeded in the same manner as in old time. It was important, therefore, to consider whether the letters missive made confirmation and consecration mere forms, as, by putting the appointment to a bishopric solely at the nomination of the Crown, they had made election. The act did not expressly direct the Archbishop to confirm and consecrate without making any inquiries, or going through the accustomed form of proceeding: was this, however, its meaning? It was contended that it was, not only from the words used with respect to confirmation, but because of the direction, that every such election should stand good to all intents. These words might mean good to all intents, as an election conducted as formerly, when the people, or clergy and people, elected. But if they meant more, still the statute made no provision for the case of a refusal by the Archbishop to confirm, by enabling the Crown to direct other Bishops to confirm and consecrate, and therefore left it in the Archbishop's power to render the election inoperative, though perhaps at the risk of the penalties of *præmunire*. Surely this seemed to show that it considered confirmation [by the Metropolitan?] as essential to perfect the election.

Where no election took place, and the Crown had simply to nominate by letters patent, the legislature seemed to have considered confirmation unnecessary. No mention was made of it, and he could not consider this as an oversight, for the Irish act which abolished elections even in form, and substituted letters patent, made no mention of confirmation.¹ From this it was argued, that, as the legislature had regarded confirmation as unnecessary, when the election proceeded directly from the Crown, it could not be necessary where the Crown appointed indirectly, and therefore that confirmation must be regarded as a ministerial act, retained only because the form of election had been retained; both being regarded as only shadows. *It was certainly difficult to see why confirmation should be necessary when the Crown appointed by means of a congé d'elire, and not when it appointed by letters patent.* It was vain to offer any conjecture as to the reasons which induced the legislature, in those troublous times, to adopt such a course; *he did not pretend to reconcile or account for all the provisions of the statute*, but he could not bring himself to believe that the solemn ceremony of consecration, which in all cases was necessary, was intended by the legislature to be made a mere form and shadow; and if the statute, in directing the Archbishop to consecrate, did not peremptorily order him to go through an empty ministerial form, neither did it do so in the case of confirmation; for both were connected together, and spoken of in the same words. At consecration, indeed, no such form of inquiry as that which took place at confirmation was provided, nor was he prepared to say that such inquiry was necessary. The Archbishop would naturally inform himself whether any valid impediment existed to the consecration; and he could not believe that the legislature intended to force the Archbishop to consecrate a man to whom he had such objections. The statute provided that on the receipt of the letters patent from the Crown, the Archbishop should confirm and consecrate without suing out any bulls, &c. from the Court of Rome; the confirmation and consecration referred to seemed to be such acts as would formerly have required the sanction of the Pope; and could it be supposed that bulls would have been thought necessary, if the act to be performed had not been a judicial one? He could not bring himself to believe that the act to be performed was regarded by the legislature as a mere form. It seemed to him,

¹ It does more, it expressly provides that the nomination by letters patent shall have the same effect, "as if the election had been duly made *and the same confirmed.*" Vide *supra*, p. 184.

therefore, that the Archbishop was required by the 5th section of the act to confirm the election as of old times accustomed, that is, in judicial fashion, and after due inquiry.

“ Assuming then that the Archbishop was empowered to act judicially in confirming, he did not think that he would be liable to the penalties imposed by the 7th section, for not confirming within twenty days, provided he had a lawful impediment, such as illness or a pending judicial inquiry. Whether those penalties could apply to a refusal to confirm from any other ground than the want of authority from Rome, he did not think it necessary to determine. He did not consider that this construction of the act derogated from the prerogative of the Crown, it only did not extend it; nor did he regard it as giving the Metropolitan a veto on the appointment of the Crown, but only as giving him a discretion to confirm according to ancient forms. It was said that no refusal to confirm had been discovered since the passing of the act, and the opinions of various writers had been referred to, which seemed to show that the Archbishops were generally considered to be bound to confirm. But it was difficult to suppose that the proceedings to be observed at confirmation would not have been altered, if it had been known to all the Archbishops subsequently to the passing of the statute to be a mere form. In that case the proceedings at every confirmation subsequently to the time of Henry VIII. would have been a solemn mockery; for there could be no doubt but that the forms observed gave to every step a judicial character. He thought, therefore, that the act of Henry VIII. did not alter the nature of confirmation, but that the fact of the powers of inquiry not having been used, arose from the necessity not having arisen. The fact of the Archbishop acting through his vicar-general, who had no jurisdiction in contentious matters, did not appear to him to deprive the Archbishop of his power of inquiry, and summoning witnesses if necessary, for confirmation was not in general a contentious proceeding. The nature of the objections stated in this case to have been made he did not think it material to consider, looking upon the miscarriage of the vicar-general as being his refusal to hear parties make objections, whatever they were.”

Now we confess, that, according to the view which we take of this duty of the Archbishop in confirming elections under the statute, there is, in the last observation, a formal justification of the conclusion to which the learned Judge came;

for the statute, as we have seen, expressly requires the election to be made "in due form," and seems to us, therefore, to make it incumbent upon the Archbishop to ascertain, if need be, that the election is so made, and, consequently, to hear objections, at least so far as to ascertain whether they object to what the old canon law called the "process of election."¹ But as the scope of the learned Judge's argument, and still more that of Mr. Justice Coleridge, goes far beyond this point, and can stop nowhere short of the conclusion, that it is the duty of the Archbishop, before he confirms an election under the statute, to consider all objections adducible, not only to the "process of the election," but also to the other branch of the inquiry, directed, as the learned Judges state, by the old canon law, "the character of the Bishop elect," — that is to say, any objection tending to show that he is not, according to the words of the sixth article of the petition for confirmation which he goes through the form of presenting, "sufficiently qualified by age, knowledge, learning, orders, sobriety, condition, fidelity to the king, and piety" — we shall make bold to consider how far the argument stated above proves that the office of confirming an election made under the statute, casts upon the Archbishop so extensive an obligation.

Now the first remark which we would make, in reference to this question, is, that the learned Judges do not profess to ground their opinion upon the natural meaning of the words used by the legislature, but derive it from considerations *dehors* the statute, without even showing that it is possible, upon their mode of construing the particular passages directly relating to the point immediately before them, to put a consistent sense upon the statute generally. Mr. Justice Patteson admits, that it was certainly a strange proceeding of the legislature, to provide that the Archbishop should inquire into the qualifications of the person nominated by the Crown, if that nomination took place through the form of an election,

¹ The two points on which it enjoined inquiry respected the "*processus electionis*" and the "*persona electi*." See IV. Lat. Council, A. D. 1215, can. 26; and Burn's Ecclesiastical Law.

but not if it was made directly; however, he considers that he is not bound to reconcile such incongruities. Mr. Justice Coleridge leaves the difficulty unnoticed. Again, both the learned Judges, but especially Mr. Justice Coleridge, express an opinion that the statute intended only to exclude the influence of the Court of Rome in the appointment of a Bishop. But neither of them explain why, if this had been the sole intention of the legislature, they made such stringent provisions for the *election* of the nominee of the Crown, though it never appears to have been thought that the right to elect a Bishop depended on the Pope's authority; or why they made the penal clause of the statute apply to *all* refusals to confirm, or consecrate, and did not confine it to the offence of refusing on the ground of the absence of authority from Rome. We confess that we are somewhat startled at this mode of construing a statute. But assuming, for the present, that it may, under some circumstances, be justifiable; let us examine what the considerations are, which have induced the learned Judges to rest satisfied with a result in itself so unsatisfactory. In substance they are as follows.

First, they say, the confirmation of the election of a bishop, according to the canon law, could not properly take place unless the person confirming was satisfied both that the election was rightly conducted, and that the person elected was qualified for the office. But the statute does not say that the confirmation of an election under it shall take place if the Archbishop is not satisfied upon these points. Therefore we infer that it requires him to be satisfied. Therefore he must have the right, and consequently it must be his duty, if called upon, to institute an inquiry into them. Secondly, the Judges say, consecration is a solemn office; we cannot think that the legislature intended to treat it as an idle form, and compel the Archbishop to act in it only ministerially. But if the Archbishop cannot satisfy himself that the person to be consecrated is qualified for the office of Bishop, he would be obliged to act in consecrating him ministerially only. Therefore the consecration would be an idle form. Therefore, before he confirms, he must be able to make such inquiries as will satisfy him on all the points on which he ought to be

satisfied, and cannot be required to act only ministerially in this office.

Now, in examining this reasoning, we must take the liberty of distinguishing two conceptions which neither of the learned Judges appears to us sufficiently to discriminate, those, namely, of "a ministerial office," and of "an idle form." We have already stated, and we believe the statement to admit of no valid contradiction, that, in the office of *consecration*, from the time at least when the process of confirmation was formally established, the consecrator acted *ministerially* only—the exercise of the *judicial function* of determining whether the person presented for consecration should be consecrated or not, being exercised *solely* on the *confirmation* of the election, and there being no room left for its exercise at the *consecration* of the person elected. But does this circumstance rob the ceremony of consecration of its solemnity or importance? — We think not. We do not see why the fact of the selection of the person who is to be consecrated being made by another person from him whose office it is to consecrate, should make the ceremony of consecration an "idle form," or a "mockery," more than the fact that the Archbishop does not select the person entitled to be crowned, makes the coronation of the Sovereign, and the religious offices attendant upon it, an idle form or a mockery. Consecration may be an idle form, or it may be the means of investing the Bishop with important powers; but it never professed to include an inquiry into the merits of the person to be consecrated, and therefore cannot become a mockery, because the person who consecrates does not make this inquiry.

The attempt to show, from the nature of the function of the Archbishop in *consecrating*, that he must have the right to exercise, in *confirming*, the judicial duties contended for by the learned Judges, is then a failure. Is the attempt to establish the same position by means of the old canon law more successful? The argument assumes that the canon law respecting confirmation was in force in England when the 25th Henry VIII. c. 20. was passed, and continued in force afterwards. Was this so? The statute immediately preceding the one on which we are commenting may enable us to answer.

It commences with a recital that

"Divers constitutions, ordinances, and canons provincial or synodal, which have heretofore been enacted, be thought to be not only much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm, but also overmuch onorous to his Highness and his subjects." In consequence, it makes a provision for the review of the canon law generally, which was never carried into effect, and in the mean time enacts that "no canons, constitutions, or ordinances shall be made, or *put in execution* within this realm, by authority of the convocation of clergy, which shall be contrariant or repugnant to the King's prerogative, or the customs, laws, or statutes of this realm." But that "such canons, &c., being already made, as be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall still be used and executed as they were afore the passing of this act," till reviewed in manner provided by it.

Now the testimony of our old historians appears fully to bear out the statement to be found in Bishop Ossory's case, and in the passage from Blackstone referred to above, [see p. 184.] that the right of selecting the person to be consecrated Bishop of a vacant see formed part of the ancient prerogative of the Crown — a prerogative which continued to be exercised till the reign of John, when the right of the free election of the new Bishop by the chapters and convents, subject to confirmation by the Metropolitan, was wrested from the Crown. But it is not necessary for us to rely solely on this ancient right. The 25th Henry VIII. c. 20. indisputably vests the appointment of the Bishops in the Crown, subject only to whatever right of inquiry may be conceded to the Archbishop as part of his office of confirming the nominal election prescribed by it. Now granting, as we do, that the function of confirming an appointment, naturally implies in the person who is to exercise it a right to inquire whether the appointment has been regularly made in those matters which are not in the discretion of the person making it, it is clear that he cannot inquire into any matters which are left to that discretion, without exceeding his jurisdiction. If a statute were to be passed, declaring that the election of all members of the House of

Commons should be confirmed, in case of dispute, by a committee of the House, it could not be inferred that they would have a right to inquire into the character of the members elect. In the present case, the statute requires that the process of election be "in due form." We admit, therefore, that it implies a right in the Archbishop to inquire into the formal regularity of the election; a matter which does not affect the prerogative of the Crown, because, if the election should turn out to be irregular, the effect would be only to give the Crown the right to appoint by letters patent. But how is it shown that the Archbishop has the right to inquire into other matters, and limit the royal prerogative of appointing the future Bishop, by refusing to confirm any one of whose qualifications for the office he is not satisfied? Not by the words of the statute. The complaint made is, that it requires no qualifications in the person to be selected — but by the old canon law; which, if it had been in force in England when the statute passed, must have been repealed from that time, by the Act immediately preceding, as "contrarient" to the king's prerogative and the "statutes of this realm."

But, even independently of this circumstance, did the canon law, recognised in England up to the 25th Henry VIII., give to the Archbishop, as the learned Judges assume, the powers now asserted for him? The acts of the legislature, and the testimony of our old ecclesiastical historians, assures us that it did not. The "ordinary jurisdiction to confirm," far from being at that time, as Mr. Justice Coleridge assumes in part of his judgment, in the Archbishop, was, as Blackstone tells us in the passage before cited, universally allowed to belong to the Popes, to whom, indeed, the later canon law expressly gives it¹, and who were accustomed to appoint Bishops at once, without any election, by what was called a Provision.² It is only by confusing the history of the fourteenth and fifteenth centuries with that of the century

¹ IVth Lat. Council, can. 26.

² Wharton's *Anglia Sacra*, vol. i. Histories of the Bishops for the 14th and 15th centuries, *passim*. See especially pp. 439. 443. 763. The form of the Bulls may be seen in Prynne's *Papal Usurpations*, ii. 420.

immediately previous, that any colour can be given to the claim made for the Archbishops. How completely indeed they had ceased to confirm at a period long antecedent to the reign of Henry VIII., and notwithstanding the attempts made by the Barons of Richard II. to restrain the Pope's authority¹, is shown by certain proceedings taken during the great Papal schism in the reign of Henry V. (A. D. 1415), for our acquaintance with which we are indebted to the researches of Mr. Badeley, the able and learned asserter of the supposed archiepiscopal right.

It appears that an act of Parliament was then passed², which recites, "that from the damnable schism which had so long existed in the holy Church, certain cathedral churches founded by the King's royal ancestors were still destitute of paternal government, because the persons chosen to them could not be confirmed by the Holy See; and that by such a state of things all the churches in the realm might become vacant;" enacts that the person to be chosen be confirmed by the Metropolitan of the district, and charges him strictly to make such confirmation, and to do effectually all things relating to it. Under this act, the Crown in the next year proceeded to issue writs: the one generally directing that the Bishops elect be confirmed by the Archbishops, *during the vacancy of the Apostolic See*; the other specially requiring the Archbishop to confirm the election of John Wakering, as Bishop of Norwich³; which it seems he accordingly did.

Yet so little was the Archbishop satisfied of his authority to confirm, that when, shortly afterwards, Martin V. was recognised by the Council of Constance as the true Pope, application was made to him to *ratify the confirmation*.⁴

Now, that the papal claims remained unchallenged in England up to the time of Henry VIII., is abundantly shown by the account of the appointments of the various English Bishops preserved to us, as we have already noticed. The

¹ See the 16 Rich. 2. c. 5., cited above.

² Rot. Parl. iv. p. 71.

³ Rymer Fœd. ix. 338.

⁴ Wharton's *Anglia Sacra*, vol. i. p. 417.

bulls by which Cranmer was appointed Archbishop were referred to in this very discussion.¹ It is clear then, that at the time when the 25th Henry VIII. c. 20. was passed, there was no law acted upon in England, under which the right of confirming the election to a vacant see belonged to the Archbishop. Two hundred and fifty years earlier, such a law might have been acknowledged; at the time we speak of, it was not. If then, as Mr. Justice Coleridge supposes, the Archbishop, immediately after the statute had passed, had asked, "How am I to confirm and consecrate?" the answer might indeed have been, "You must *consecrate* as you did before, *i. e. ministerially*, conferring by that act whatever powers it may bestow upon the nominee of another;" but the answer could not have been, "You must *confirm* as you did before:" for before the statute passed, he had no authority to confirm at all, unless as the special delegate of the Pope. From the statute alone he derived his power; to the statute, therefore, he had to look in order to learn what power was given him, what functions he had to exercise in confirming. Now, that the statute did not confer upon the Archbishop the authority exercised by the Pope, or which he may have wielded in particular cases as the Pope's delegate, is clear, since that would have extended to dispensing with the form of election altogether. We cannot therefore infer, with Mr. Justice Patteson, that, because if the Archbishop had confirmed by the authority of a Papal bull, he might have exercised certain judicial functions, therefore he has jurisdiction to exercise the same functions when he confirms by the authority of the statute. And we have already seen to what subjects its provisions naturally limit the right of inquiry which, by implication alone, it gives him. The true answer, then, to such a question as Mr. Justice Coleridge suggests, would have been, "You must so confirm as to give effect to the royal nomination. The mode in which this is to be done you are at liberty to choose; but this must be the result."

Now we have already shown that this is precisely what the

¹ They are enumerated in Burnet's History of the Reformation, i. p. 128.

Archbishops appear all along to have intended to do.¹ They selected, indeed, from the storehouses of ecclesiastical forms the form used in ancient times on the confirmation of an election freely made. But, by the nature of the proof which they admitted, by the person to whom they committed the trial of the supposed cause, they showed that they regarded themselves as not called upon to inquire, and, in fact, they never have inquired judicially, into the merits of the person elected.

We have before admitted that the form thus adopted, in its practical operation, is an absurd mockery. Whether it would not still be in the power of the Archbishop to change it, is a question on which we give no opinion. But be that as it may, the legislature are not answerable for the absurdities consequent upon its adoption, for they did not require it to be adopted; and must be taken to have supposed that the Archbishop, in exercising the *new* though *restricted* authority which they thought fit to give him, would have selected such a form of procedure as should be suitable for its exercise. Arguments drawn from the inherent absurdity, which the recent proceedings have brought to light, in the practice of the Ecclesiastical Courts upon the confirmation of an election under the statute, are therefore entitled to no weight when the question is the construction of the statute. The only circumstance which could give these forms any importance,—evidence of the Archbishops having adjudicated on objections made to the qualifications of the persons whose election they were called upon to confirm, or used the forms as a means of inquiry for their own satisfaction before confirming,—is admitted to be wholly wanting.

The argument drawn from the nature of the Archbishop's duties in consecrating we have already disposed of.

We have argued the question as lawyers: but before we quit it let us look at it for a moment with the clear vision of common sense, by which the great outlines of the arguments,

¹ It may be observed, that it does not appear to be ascertained when the present form used in confirmation was adopted; whether on the original passing of the statute, or on its revival in Queen Elizabeth's time: a passage subsequently cited from Cranmer, seems to us to make the latter time the most probable.

scanned in microscopic detail by the lawyer's eye, must always be discernible, if those arguments are to have a solid foundation.

What then is the substantial question? It is this: We find the Parliament taking away from the Pope the right, by theory and practice long vested in him, of appointing the English Bishops, and providing for their appointment in future under the new system then about to be introduced. Did the Parliament mean to vest this power in the Crown alone, or in the Crown jointly with the Archbishops of Canterbury and York? Did it mean to give those "holy men," for whose imagined feelings Mr. Justice Coleridge expresses so much sympathy, a right of controlling the appointment of the Bishops in their respective provinces, which for centuries they had not possessed, or to leave them in this respect as it found them, bound, in the discharge of the ministerial duties of their office, to consecrate the nominees of others, without inquiry into their qualifications; with this difference only, that, whereas the selection formerly lay in the Pope, who was considered to have the power, if need be, of dispensing with the qualifications ordinarily required, it would in future be in the Sovereign, in whom the legislature had confidence that he would always select persons properly qualified?

We can have no doubt how common sense must answer this question. What sign is there in this statute, or in any other cotemporary proceeding, of a disposition in the Parliament of the day to limit the power of the Sovereign in the appointment of his Bishops? What marks of any distrust of the probable exercise of his power? For an amusing picture of the oriental flattery which Henry was accustomed to receive from his faithful Lords and Commons, we must refer our readers to Mr. Creasy.¹ While that the Sovereign himself would, as Mr. Justice Coleridge supposes, have disclaimed the absolute right of selecting who should be a Bishop, lest he should chance to compel his Archbishop to consecrate a "heretic" or a "mocking infidel," must seem the strangest supposition to any one at all conversant with the

¹ *Sub Rege Sacerdos*, p. 69.

history of that age. To look no further than the statute itself. The painful fear of the possibility of distressing the conscience of a "holy" Archbishop, seems, as Lord Denman most justly observed, strangely irreconcilable with the clauses requiring, under the penalties of *præmunire*, "holy" Deans and Canons to elect as their Bishop the person named in the letter missive of the Sovereign, and "none other," and Archbishops to consecrate the person presented by the letters patent of the Crown, in default of election without confirmation. But the supposition becomes ludicrous, when we consider that this very sovereign and his legislature only nine years later declared, as Mr. Creasy reminds us,—

"That if any spiritual person preach, teach, or maintain any thing contrary to the king's instructions or determinations, *made, or to be made*, and be thereof convicted, he shall, for the first offence, recant; for the second, abjure and bear a fagot; and for the third, *be adjudged a heretic, and be burned*, and lose all his goods and chattels."¹

It has been indeed argued, by the Bishop of Exeter², that evidence of a contrary tendency is furnished, by a passage in a work entitled "The Institution of a Christen Man," compiled by Cranmer, and published A. D. 1537, four years after the passing of the statute on which we have been commenting. This work, after declaring that "within this realm the presentation and nomination of the bishoprics appertaineth unto the King's Highness," and that to other lesser cures to divers persons enumerated, proceeds thus,—

"And unto the Priests or Bishops belongeth, by the authority of the Gospel, to approve and confirm the person which shall be by the King's Highness, or the other patrons so nominated, elected, and presented unto them, to have the cure of these certain people within this certain parish or diocese, or else to reject him, as was said before, from the same, for his demerits or unworthiness."³

¹ 34 Hen. 8. c. 1.

² In the debate in the House of Lords, upon the decision in the Queen's Bench.

³ pp. 43 and 44 of the old edition. For the full statement of this and the following passages, and an able commentary upon them, we refer our readers to Mr. Creasy's work.

But, independently of the obscurity of this passage, arising from the apparently studied manner in which the reference to the appointment of Bishops is mixed up with that of Priests, it is unfortunate for its weight as an authentic exposition of Henry's views on the subject, that the work in which it appeared was not set forth by him; while in the republication of it in 1543, under the title of "*A Necessary Doctrine and Erudition for any Christen Man*," after it had been carefully corrected by the King, "examined and re-examined, submitted to several select committees of Bishops, and received the approval of convocation,"¹ the passage relied upon does not appear. In its stead, however, is another, in which we are told,—

"That there is no certain rule prescribed or limited by the word of God for the nomination, election, presentation, or appointing of any ecclesiastical ministers; but the same is wholly left to the positive lawes and ordinances of every Christen region, provided and made, or to be made, in that behalf, with the assent of the prince and ruler. . . . For the truth is, that God constituted and ordained the authorities of Christen Kyngs and Princes to be most high and supreme above all other powers and officers in this world. . . . And to them, by right, and of Goddis commandment, belongeth . . . specially, and principally, to defend the faith of Christ and his religion, to conserve and mainteyne the true doctrine of Christ, . . . and to abolishe all abuses, heresies, and idolatries And, finally, to oversee and cause that the seyd Bishops and Priestes do exercise their pastoral office truely and faythfully. . . . And if they obstinately withstand their Princes kynd monition . . . to put other in theyre roumes and places."

Thus much for the opinions of the King on this subject. For those of his Archbishop, on the very point on which the learned Judges of the Queen's Bench lay so much stress, the supposed binding nature of the old judicial forms used on the occasion of confirmation, Mr. Creasy most happily refers us to one of Cranmer's answers to a series of questions, preserved in the Lambeth Library and the British Museum,

¹ *Sub Rege Sacerdos*, p. 80.

"concerning the sacraments, and the appointment and powers of Priests and Bishops."¹

"All the said officers and ministers," he says, "as well of the one sort as the other, be appointed, assigned, and elected, in every place by the laws and orders of Kings and Princes. *In the admission of these officers be divers comely ceremonies and solemnities used, which is not of necessity, but only for a good order and seemly fashion, for if such offices and ministrations were committed without such solemnity, they were nevertheless truly committed.*"

Whether then we confine our attention to the statute alone, or look beyond it for such contemporary evidence as we can find of the intentions of its framers, the result is the same,—the attempt to put upon the 25th of Henry VIII. a construction different from that which it has received for the last 300 years, however great the ability of those who made it, must be pronounced to be a failure; nor,—when we consider that the learned Judges, who were ready to disturb what for so long a period has been regarded as settled law, on a point of so much importance, relied, not upon the natural meaning of the statute, but upon a technical construction put on one expression in it, by reference to regulations which cannot be shown to have been acted upon in England for five centuries, in irreconcilable opposition to the general scope of the statute, and in admitted inconsistency with its other provisions, *because* they could not believe that the legislature intended to put upon the consciences of "holy men" a burden, which they have borne for 300 years without complaining,—do we think that the Lord Chief Justice deserves the blame which he has received in some quarters, for refusing to allow of further discussion. It has been urged that—because, as Lord Denman admitted, the ordinary practice of the Court would not have refused a mandamus, in the case of any ordinary railway act, if one Judge only thought that it ought to go; considering that there can be no appeal from the refusal, while an erroneous decision upon the writ admits of correction by a higher tribunal,—therefore it was wrong to refuse the writ in a case

¹ Mr. Creasy refers to Jenkyn's ed. of Cranmer's Remains, ii. 98.

of so much importance as this, when the Court was equally divided. We answer, with all respect to these learned Judges; that they did not apply to the interpretation of this statute the principles by which they would have been guided in interpreting any ordinary Railway Act, and therefore the case called for different treatment.

The real question in this case is, in fact, one which should be discussed, not in Courts of Law, but in the Court of Parliament; and if the construction of the statute had been far less clear than we think it to be, we consider that the uninterrupted usage of 300 years, during which no serious attempt has been made to call in question the right of the Crown under this statute to appoint the English Bishops, without any control except that which public opinion supplies, would have justified the Judges in saying, — We are not the source from whom alterations in the recognised law of England should proceed.

If the people of England really wish to give the ecclesiastical authorities a control over the nomination of Bishops, regulated only by such an interpretation of the ancient canonical requisitions, as may grow up under the fostering care of the spiritual courts; if they wish that the appointment of “judges of the supreme tribunal of appeal, of legislators of the land, those who by vote and influence will have power to promote or retard all measures of government, of law, of commerce, of administration, of taxation, not only so far as they regard members of the [Anglican] church, but as they affect also the millions of Catholics, of Presbyterians, and of all sects and denominations who are subjects of the British Crown,”¹ should not be vested solely in the discretion of the Sovereign, to be exercised through ministers, responsible to Parliament; they have in their hands the means of giving effect to their wishes. But we do not believe that such is their desire. We do not believe that they have any wish to leave the paths of free thought which the Reformation opened before our country, and along which she has steadily advanced to greatness and to glory. We do not

¹ *Sub Rege Sacerdos*, p. 9.

think that they have any inclination to bow down to ecclesiastical dominion, or place any additional fetters on the utterances of earnest thought either in the laity or the clergy. We believe that the general opinion agrees with that expressed by Mr. Creasy, in considering that to uphold the uncontrolled power of the Crown in the appointment of Bishops, is really to maintain the cause of civil and religious liberty.

The sentiment uttered by the Bishop of St. David's, in the debate in the House of Lords, to which reference has been already made, is, we are satisfied, true, "That there never was a time when the power of the Crown in the appointment of a Bishop was more subjected to the wholesome and legitimate influence of public opinion," than the present time; and we think that the selection of good Bishops is more effectually and better secured by this indirect control than it would be by any ecclesiastical machinery for inquiring into their characters or opinions. We believe that the public feeling now is, and we trust it will always continue opposed to the introduction of any such investigation; and that the only alteration of the law which it would desire to see made in the appointment of the Bishops is the abolition of the farce of election by a body who have no legal right to exercise a choice, and of the present form of confirmation, and the assimilation of the law of England to that which for nearly 300 years has been the law of Ireland, by enabling the Crown at once by its letters patent to nominate the person selected for a Bishop, and present him to the Archbishop to perform the *ministerial* office of consecration. And we may conclude this article by expressing our hope that such an alteration in the law may be speedily made.

ART. IX. — TAYLOR ON EVIDENCE.

A Treatise on the Law of Evidence as administered in England and Ireland, with Illustrations from the American and other Foreign Laws. By JOHN PITT TAYLOR, Esq., of the Middle Temple, Barrister-at-Law. In two volumes. London, 1848.

NOT long ago a gentleman, holding a high rank in literary and scientific circles, was stating, in our hearing, some curious circumstances regarding a foreign country. An eminent lawyer who happened to be present asked him on what *evidence* his statement rested. "*Evidence*" was the astonished exclamation, — "why it is the *fact*!" It really took us some time to explain to him and two or three others of the company, that the existence of a fixed impression on the mind is not sufficient, without showing on what it rested, or in what manner it had been received and confirmed. The majority even of the most cultivated people will be found pretty nearly in the same condition as our friend in this respect. The maxim, *de non apparentibus et de non existentibus eadem est ratio*, as interpreted by lawyers, is a riddle to them; and again and again have we watched, with philosophical equanimity, the very natural impatience and fretfulness which a client exhibits, when he is told that, though his case may be as clear as noonday, there is not the remotest chance of establishing it before the Court. "I tell you I paid the man the money six months ago." "Have you got a receipt?" "No." "Was any one present?" "Nobody but my wife." "Then the sooner you pay the money again, the better; for the only result of defending the action will be to make you liable for a heavy sum in costs." And away goes our client, with much the same notions of English justice as may be supposed to have been entertained by the respectable Turk who used to sell rhubarb in Cheapside, and who, having had his rhubarb stolen, and being unable (as required

by a blundering magistrate) to find security to prosecute, was actually committed to Newgate for the heinous offence of being robbed.

Turks, however, submit to these things with the simple exclamation of "God is Great." Englishmen rail and swear, and, instead of blind submission to them as the decrees of destiny, rather incline to the motto of a well-known French Society — *Aide toi, et Dieu t'aidera*. We know no branch of our law that has been the real, though indirect, cause of more dissatisfaction with the entire system than the law of evidence, or one in which technical conclusions have been more frequently at variance with those at which unprofessional reasoners would arrive on the same subjects. Bentham, it is well known, wrote a book, in five large volumes, to expose and refute the doctrines of evidence adopted by English Judges; and one of the closest thinkers of the day (Mr. John Stuart Mill) has edited it with notes, which do the highest credit to the logical powers of his understanding. But both writer and editor were deficient in practical knowledge; and more than half the book is based upon errors which the practitioner will recognise at a glance. Bentham's favourite notion was, that a judge might proceed like the father of a family; call every one before him; hear what every one had to say, including the complaining and offending parties; admit all sorts of evidence without exception; and then sift and analyse it, so as to give to each witness, document, statement, proof or indication, the precise weight or value he, she, or it was entitled to. But he forgot that the judge has not the minute personal knowledge which makes such a mode of proceeding comparatively safe for the *paterfamilias*; he forgot, above all, the time that must be expended in listening to the hearsay of hearsay, and the prejudices that might be excited, as well as the extent to which attention must be distracted, by irrelevancies. Take, for example, a specimen of the evidence adduced on the trial of the ex-ministers of Charles the Tenth, which was conducted on the non-exclusion principle: —

"14th witness, M. Plongoulm, aged 33, advocate of the Court Royal.

"*The President.*] Having been commissioned to prepare an historical notice of the 26th, 27th, and 28th of July, you may be better acquainted than others with facts of importance; have the goodness to state to us what you yourself may deem fit to aid justice.

"*M. Plongoulm.*] I have no personal knowledge of any fact of importance, or which appears to me to have any bearing on the prosecution. However, as *M. le President* says, I have been intrusted with a work which has put me in the way of collecting documents that may be of use. But (continued the witness, after a few more remarks of this sort) my deposition will bear rather upon what appears to me to have been the honourable actions performed, than on the gist of the proceedings.

"*The President.*] You have sworn to tell the whole truth.

"*M. de Martignac.*] I know not of what advantage the deposition of this witness can be, since he has no knowledge of any fact, and will confine himself to narrating what he learnt with the view of writing a history.

"*M. Plongoulm.*] *I set out by declaring that I had no personal knowledge of the facts.* What appears to concern the prosecution is the manner in which the attack commenced. Events did not occur in the same manner on all points, &c. &c. It has been declared to me that, on Wednesday the 27th, at the beginning of the affair, an officer of the gendarmerie killed an old man with great inhumanity, after trampling him under his horse's feet. I have no knowledge of this fact; it is, as far as I am concerned, an *on dit*. I repeat it to the Court, that it may be convinced I am telling the whole truth. I have had to inquire for *les belles choses* only, and not for such as might sadden. I may add, that in the Rue St. Denis, a citizen, wholly inoffensive, was killed by the garde royale whilst he was seeking shelter in the corner of the street. The soldiers afterwards amused themselves by piercing him with their bayonets."

In England, possibly, we have gone too far the other way. The strongest moral conviction, resulting from an infinity of corroborating circumstances, is of no account, unless the witness was actually present and saw the thing done; and the comprehensive, almost boundless, field of admissible proof, over which Bentham would allow the freest range to the litigant, is inclosed and hedged in by a multitude of arbitrary and sometimes capricious rules, — the accumulated

wealth (or dross) of centuries of forensic refinement and judicial decision. These, in fact, constitute the Law of Evidence, which Mr. Taylor has undertaken to expound and elucidate in the treatise before us. He comes to the task with qualifications very far superior to those ordinarily exacted from the composers or compilers of English law-books. He is not simply a man of talent and industry, or a sound lawyer in the common acceptance of the term; he is thoroughly conversant with all the learning directly or indirectly bearing on his subject; he is an accomplished scholar, as well as a skilful logician; and the origin of this very book shows that he has broken through the narrow conventional mode of study, and, quitting the domestic and more familiar ground to which his predecessors have pretty generally confined themselves, boldly repaired to other countries for topics of illustration and comparison. The preface begins as follows:—

“ The following work is founded on Dr. Greenleaf’s *American ‘Treatise on the Law of Evidence.’* Indeed, when in July, 1843, my attention was first especially drawn to the subject of evidence, with a view to publication, I undertook to discharge the duties of an editor only, and it was not until I had been engaged for many months in that undertaking that I finally determined to abandon it, and to submit to the public a treatise of my own. In taking this step I had no idle hope of being able to produce a book which, regarded as an exposition of general principles, should surpass, or even equal, that written by the learned American professor; but I thought that, by citing more fully the leading decisions of our own Courts; and by introducing such portions of our statute law as related to the subject of evidence, I might possibly compile a work of more practical utility to the English and Irish lawyer. To have introduced this new matter in the shape of notes to Dr. Greenleaf’s treatise would have been highly inconvenient; to have interwoven it with his text, and still to have called the work by his name, would have been alike unjust to him and to myself; and, consequently, it appeared to me that the only alternative left was to publish a work in my own name, for the errors of which I should be alone responsible.

“ I have still, however, availed myself very largely of Dr. Greenleaf’s labours, having adopted, with but few alterations, his

excellent general arrangement, having followed to a considerable extent the course even of his sections, and having borrowed many pages of his terse and luminous writing. My object has been to afford to the profession really useful and accurate information; and whether that information were conveyed in my own or another's language has been to me, as it will doubtless be to my readers, a matter of indifference."

A writer who undertakes, even with the aid of Dr. Greenleaf, to produce a more readable work than Mr. Phillipps's, or a more scientific work than Mr. Starkie's as originally written, or a more useful book of reference for the mere practitioner than Mr. Roscoe's as edited by Mr. Smirke, undertakes no trifling matter. But Mr. Taylor appears to have formed no undue estimate of his own powers; and though it is not our custom to go much into practical details, we will rapidly indicate the parts which, independently of his general merits, fully entitle him, in our opinion, to the credit of having made a highly useful contribution to our practical legal literature.

The admissibility and effect of judicial records and documents, whether *in rem* or *inter partes*, is a topic which has hitherto not received the attention due to its importance. Both Mr. Phillipps and Mr. Starkie have comparatively neglected it. Mr. Taylor has treated it with fulness and precision, and he has also specified what records are under the custody of the Master of the Rolls, how public documents of all kinds are to be proved, and who are entitled to inspect and take copies of them. The conveyancer, as well as the *nisi prius* lawyer, will find information very useful to him under this head. The Chapters (II. and III.) which treat of matters judicially noticed, and of the respective functions of judge and jury, are very well written, and appear new. The history of Lord Denman's Act for restoring the competency of witnesses, is traced with clearness, and its provisions are discussed with ability. Mr. Taylor awards to Bentham the credit of overthrowing the erroneous and prejudiced doctrine which was finally rooted out by this Act; but he has said enough to show that he would perfectly agree with us in awarding to Lord Denman the exalted praise,

never before awarded to a Chief Justice, of being at the head of the most enlightened law-reformers of his day.

The fallacy of the axiom regarding circumstantial evidence, "Witnesses may lie, but circumstances cannot," is well exposed at p. 60. But we shall take an example of Mr. Taylor's mode of interweaving popular and literary allusions with his reasonings, from the sixth chapter, in which he speaks of the effect created by the production of weapons or other material instruments of proof:—

"Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist; and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, 'was by a beggar woman stolen away,' became a bricklayer when he came of age,' and was his father, one of the rioters confirms the story by saying, 'Sir, he made a chimney in my father's house, and the bricks are alive to this day to testify it; therefore deny it not.' Archbishop Whateley, who makes use of the above anecdote in his diverting '*Historic Doubts relative to Napoleon Buonaparte*,' adds, 'Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold.' So in the interesting story of '*The Amber Witch*,' the poor girl, charged with witchcraft, after complaining that she was the victim of the sheriff, who wished to 'do wantonness with her,' added that he had come to her dungeon the night before for that purpose, and had struggled with her, 'whereupon she had screamed aloud, and

had scratched him across the nose, as might yet be seen, whereupon he had left her.' To this the sheriff replied, 'that it was his little lap-dog, called Below, which had scratched him while he played with it that very morning,' and having produced the dog, the court were satisfied with the truth of his explanation."

We have some recollection of a case before Lord Eldon, in which certain oak trees were attached to an affidavit.

One great advantage anticipated from digesting or codifying our law, is the opportunity thus afforded for specifying its defects and inconsistencies, or what Burke would call "the shameful parts" of the system. It is highly to Mr. Taylor's credit that, so far as his peculiar studies extend, he has excellently performed this duty of a codifier. A material amendment (carried into effect by 8 & 9 Vict. c. 13.) was suggested by him in the progress of his work; and the following extract from his Index (which is laudably minute and full), will show how useful the writer of a practical law-book may make himself to the legislature, without in the least neglecting his own peculiar province:—

"To admit seals of foreign states and colonies without proof. To extend to criminal cases the power, now vested in the Judge, of amending the record in civil cases. To abolish averments of time, which need not be proved. To abolish distinction between local and transitory offences. To render the non-joinder of a plaintiff ground only for plea in abatement. To enlarge the power of ordering views of the spot in dispute by the jury. To admit entries made by tradesman or merchant in his own shop-books. To allow payment into court in all personal actions except crim. con. To allow plea of payment into Court without counsel's signature. To prevent payment into Court being regarded in light of admission of cause of action. To limit the rule rejecting confessions on the ground of inducement held out. To admit confessions purporting to have been taken on oath. To render communications to clergymen and medical men privileged. To abolish rule requiring two witnesses to each overt act in treason. To render the punishment for treason less abhorrent. To abolish rule of Ecclesiastical Courts, requiring more than one witness. To limit the admissibility of usage to explain contracts. To adopt one uniform scale of costs for the remuneration of witnesses. To make provision for paying the expenses of witnesses for prisoners. To

enable inferior courts to issue subpoenas beyond their jurisdiction. To direct that Court of Queen's Bench should enforce obedience to such subpoenas by attachment. To empower masters, examiners, and commissioners in Chancery, directly to enforce attendance of witnesses. To establish a uniform mode of enforcing attendance of witnesses before all Courts. To render parties competent witnesses. To enable party to show that his witness has previously stated facts in a different manner. To allow cross-examination as to contents of writings, without producing them, where object to test memory or veracity. To modify the rule which protects witnesses from self-crimination. To allow prisoners copies of indictments. To make the register of a ship *primâ facie* evidence of all its contents in every case. To authorise courts of law to compel inspection of documents, whenever equity would compel a discovery. To protect instruments from being vitiated by unauthorised or accidental alteration of strangers. To allow the comparison of handwriting."

The propriety of most of these suggested amendments is self-evident; and we respectfully recommend them to the consideration of Lord Denman, Lord Campbell, and Lord Brougham. We doubt the propriety of rendering parties competent as witnesses; at all events, we cannot agree with Mr. Taylor, "that every argument that can be urged in favour of admitting the evidence of interested witnesses in general, applies also to that of parties." It is still an open question among the most unprejudiced and enlightened reasoners on such subjects. The last suggestion on the list, "to allow the comparison of handwriting," is one that should be acted on forthwith; for the divided state of opinion on the point may lead to great practical inconvenience, and tends to discredit judicial authority. We allude more particularly to the case of *Doe dem. Suckermore*, 5 A. & E. 703. The facts are sufficiently stated in the marginal note:—

"Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an Ecclesiastical Court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause); and he stated he believed them to be his. On the follow-

ing day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had made in Court. Per Lord Denman, C. J., and Williams, J. Such evidence was receivable. Per Patteson and Coleridge, Js. It was not."

In order fully to illustrate the present uncertain state of the law on this important question, it is only necessary to quote the following passage from Mr. Taylor's second volume, pp. 1223, 1224: —

"Till within a recent date it has been thought that the proof might be established in one or both of two ways; either by producing other documents, admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute; or by calling witnesses, who from a prior examination of these documents could, without an actual comparison, pronounce their belief as to whether or not the instrument in question were written by the same hand. But though in the case of *Doe v. Suckermore*, the judges of the Court of Queen's Bench, differing as they did with respect to the immediate possession before them, appear to have recognised the legality, if not of both these modes of proof, at least of the latter; yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

"The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter, when it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by an ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents, which were admitted to have been executed by the ancestor; that they were written in a remarkable character, and that his mind was so pressed with that character as to enable him, without immediate comparison, to say whether any other document was or

was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, not from a course of business, like a party's solicitor or steward, but from studying the signatures for the express purpose of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible, the latter noble lord observing, that the cases of *Doe v. Tarver*, and *Sparrow v. Farrant*, if correctly reported, had gone further than the rule was ever carried ; *that the Lord Chief Justice entertained the same views on this last subject* ; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised."

The Lord Chief Justice (Denman) evidently thought that the witness in *Doe dem. Suckermore* stood upon the same footing as a party's steward or solicitor; and it is certainly true that he did not draw his inferences from a comparison *in court*. But he made the comparison for the express purpose of giving evidence in the cause. The bare locality of the examination can make no difference in principle ; and we should therefore incline to class him in the category of witnesses whom it had been the received practice to exclude. But the high authority of Lord Denman raises a very serious doubt, and that doubt should be removed without delay.

NOTE TO ART. I.

French Republican Judicature.

WE little dreamt, when pointing out comparatively petty evils in the judicial system of France, and prescribing the cure, that before our remarks saw the light there should be inflicted on that ill-fated country a mischief the most enormous that can visit any community — the entire destruction, by law, of judicial independence, the abrogation of every security for the administration of justice. As a physician who, having prescribed a drug for a cold or a headache, finds the patient, before he has taken it, struck down with apoplexy, shakes his head, and bids the prescription be cast out of the window as now become useless, so we, after recommending certain changes in matters of far less moment, and even felicitating ourselves on the new Republic having anticipated our advice in the question of the *annonces judiciaires*, and thereby removed a stain from the purity of the Bench, now are astonished with the incredible intelligence, that the judges are all made removable at the pleasure of the government, and the independence of the Bench is made an impossibility, and the very existence of justice in France is become a dream.

The ground of the change — the judicial revolution, is, that an “irremovable magistracy is incompatible with republican government.” This is only to be believed upon the evidence of our senses. These words are extracted from the “*Moniteur*,” the official journal or gazette of the Government. Therefore, it is now, and for the first time, (because in most of the states of America the very contrary principle has been adopted,) promulgated, that a republic cannot have judges independent of the government; that is, it must, in order to exist at all, have the laws, criminal as well as civil, for political offences as well as for others, between political partizans and the state, as well as common persons, administered

by persons, falsely, ridiculously called judges, but in reality officers of the government, that is, of the rulers for the day—the demagogues who for the hour are at the head of affairs. In other words, that the administration of all justice must be in the hands of the multitude—the mob, else the republic is gone. This is the declaration promulgated by the chiefs of the new Republic, and it is followed by the immediate removal of four chief judges presiding over as many of the highest courts of justice—those of Aix, Pau, Montpellier, Nancy,—and the learned, able, and virtuous M. Barthé, first president of the Cour des Comptes.

It is now, therefore, ascertained that the citizens of France can hope for security neither to their property, nor to their lives, nor to any other inferior rights. Every man may be tried as in 1792, -3, and -4, or according to the colour of his political creed, and may be sentenced, not according to his acts, but according to the estimation in which he is held by the journals of the government and the mob of factious or sordid men, for whose depraved appetites they pander; nay, according to the will of the populace itself surrounding the court in which these government agents, degrading the office, and abusing the name of judge, sit as long as their tyrant masters the mob may please to allow them. All this is of course a prelude to the actual choice of all judges being vested in the people; that is, a few scores of their leaders; but, indeed, whoever may appoint judges, they and their decrees must needs be in the hands of the multitude as long as the multitude has the power of removing them, as long as the falsely called judicial office is only held during the mob's pleasure.

Nor let any of the French, prone to flatter the new power, as so many of their journals do, quailing under the fear of the populace, tell us that this law only replaces France in the position in which England was under the Tudors and the Stuarts. That would be bad enough for a free country; but that is not her situation at all. The judge removable at a sovereign prince's pleasure is in a very different position from the judge removable at a mob's demand, or the demand of a mob-chief. The prince and his dynasty act according to

certain known principles ; the judge may be fain to square by these his judicial course ; but, at least, there are lines, and limits, and rules by which the royal caprice is bounded ; and, above all, he is remote from the scene. In cases that affect him, once in a thousand times occurring, his influence over the Court is felt. In all ordinary cases he stands indifferent ; and the removable judge decides according to the law. We to this day cite the Rolls and the Holts and the Powells, as much as we do the Mansfields and the Hardwikes. But who can hold up his head to cite the decisions of the Revolutionary Tribunal ? The populace is a tyrant every where present ; and each of the mob domineers in the people's name. No judge can be sure in France that the same rulers — nay, that the same principles, continue to regulate the state, when the cause before him is to be decided in the afternoon, as when it was opened in the morning. No judge can know to what tyrant's will he must yield his obedience, to what popular principle he must conform his decision. The reference, therefore, of the flatterer to our old history is as false as all that comes from such sources ; and the experience of all this shows that no flattery is so fatal as that which is offered to the base appetite of the mob.

Let us, in passing, mark the strange circumstance, that this most important act of the new government — by far the greatest of its errors or crimes — has been passed over by nearly all the journals, both of Paris and London, which affect to enlighten, and even to guide, the opinion of the people. But they have also, bewildered in their speculations upon the future, passed over the fact by far the most indicative of what is to be the conduct of the young Republic, and even the most prophetic of its fate. So wrapt up are these organs of public opinion in common matters, — as processions, armies, mob-gatherings, the fluctuations of the markets, the state of the stocks, the speeches of ministers or agitators. The decree constituting every judge, criminal as well as civil, into a tool of the ruler of the hour, or the clubs, or the out-of-doors mobs, indicates of course that the justice of the old republic — of the revolutionary tribunal of Fouquier-Tinville,

and the other ministers of the first revolution, is restored ; — when men were judged to die because some one fancied they were guilty of “ *incivisme*,” or “ *moderantisme*,” or “ *negotiantisme*,” — because they had shown “ no zeal for the republic,” — because they had an uncle or nephew “ *ex-noble*,” — because they were seen to keep “ suspicious company,” — because they were “ suspected ” persons (*suspectes*), — because they were “ suspected of being such ” (*soupçonnés d’être suspectes*). We have now lying unfolded before us a list of persons, with the crimes laid to their charge, and the foregoing are the principal ones; scarcely one distinct offence, even against the republic or its principles, being laid to the charge of any of these innumerable victims, whose accusation before the “ judges holding office during pleasure ” was speedily followed by their murder under colour of law. The times we live in *may* for a season prevent the revival of the very worst of the revolutionary laws from leading to the same course of political massacre; we may not at once see sixty or seventy victims of all classes—even the most humble—hurried to the scaffold, in consequence of private informations given by expectant heirs, personal enemies, lovers of wives or of husbands, desirous to get rid of troublesome lives; but of this we may be well assured, that such a consummation will arrive — that such times are once more in store for unhappy France, if she consent again to crouch beneath the intolerable usurpation which now places some thousands of armed ruffians in authority over all Paris, and Paris over all France. That five and thirty millions of a gallant people should tamely submit to such a degrading, such a shameful slavery, is hardly conceivable. It is far more incredible and far more disgraceful now than sixty years ago, because there is no longer the republican enthusiasm which then prevailed, and which the impolitic attacks of foreign powers kept alive. We trust that this outrage upon all principle will help to effect the happy emancipation of the country, the establishment of a regular government, and the end of the anarchy which at present universally prevails.

PROCEEDINGS OF THE SOCIETY

FOR

PROMOTING THE AMENDMENT OF THE LAW.

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

GENERAL MEETING, NOV. 3. 1847. — The RIGHT HON. STEPHEN LUSHINGTON, LL.D., in the Chair.

The Minutes of the last Meeting (the 28th of July last) were read and confirmed. The following Members were balloted for and elected: Patrick Johnson, Esq., Official Assignee, 20. Basinghall Street, City; and Robert Houstoun, Esq., 26. Bryanstone Street, Portman Square.

The following reference was made to the Parliamentary Committee: "To consider the privilege of Parliament as protecting individuals from the consequence of an arrest for debt who would otherwise be liable."

The following reference was made to the Committees on Common Law and the Law of Property: "To consider the effect of Conviction for Felony upon the property of the person convicted."

The Report of the Committee on the Law of Property on the following reference was presented: "To consider the propriety of amending the Law of Landlord and Tenant, by giving the Tenant a right to compensation for permanent improvements; having regard particularly to the present rule of Law which prevents an Agricultural Tenant from removing Fixtures."

It was ordered that the Report should be printed and taken into consideration at the next Meeting.

The Report of the Committee on Equity on the following reference: "That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and con-

stitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery"—was ordered to be received.

Adjourned till Wednesday, the 1st day of December next, at Eight o'clock in the evening precisely.

GENERAL MEETING, Dec. 1. 1847. — The RIGHT HON. LORD BROUGHAM in the Chair.

The Minutes of the last Meeting (the 3rd of Nov. last) were read and confirmed. M. Von Savigny, Minister of Justice to the King of Prussia, was elected an Honorary Member; and M. Victor Faider, Advocate, Brussels, was elected a Corresponding Member. The following Members were balloted for and elected: Charles Waterfield, Esq., Registrar of the District Court of Bankruptcy, Leeds; and Henry Philip Hope, Esq., Official Assignee, Leeds.

The Report of the Committee on the Law of Property on the following reference was considered: "To consider the propriety of amending the Law of Landlord and Tenant, by giving the Tenant a right to compensation for permanent improvements; having regard particularly to the present rule of Law which prevents an Agricultural Tenant from removing Fixtures."

It was ordered that the Report should be referred back to the Committee, with a view to re-consider the question as to compensation.

A Paper on the subject of Courts for the Recovery of Small Debts was read.

It was agreed that the Paper should be printed and taken into consideration at the next Meeting.

The following reference was made to the Committee on the Law of Property: "To consider the subject of Professional remuneration."

Adjourned till Wednesday, the 12th day of January, 1848, at Eight o'clock in the evening precisely.

GENERAL MEETING, Jan. 12. 1848. — Mr. COMMISSIONER FANE in the Chair.

The Minutes of the last Meeting (the 1st Dec. last) were read and confirmed. The following Members were balloted for and elected; Sir Henry Willoughby, Bart., M.P., Brook Street; Charles Lushington, Esq., M.P., Palace Gardens, Bayswater; Thomas Lyon Thurlow, Esq., Baynard's Park, Crawley; Joseph Fletcher,

Esq., Barrister and Inspector of Schools, 17. Savile Row; G. Lathom Browne, Esq., Barrister, 3. Brick Court, Temple.

It was resolved, "that, with a view to consider alleged defects of the Law, a Committee should be appointed to receive and collate brief statements of all such alleged defects, and also statements of all proposed remedies."

The Paper on the subject of Courts for the recovery of Small Debts was considered, and

It was resolved, "that this Society having had laid before them by Members, several written and printed statements with respect to the County Courts recently established, which have been fully discussed, are of opinion that these Courts have been the means of rendering justice to many thousands of persons whose grievances would otherwise have remained unredressed.

"That this Society, however, considers that it is the bounden duty of the Legislature to consider any justly founded objections which may arise as to the procedure of these Courts with a view to render them more efficient.

"That this Society concur with the remarks made by the writer of the Paper on the subject of the expediency of endeavouring to improve the proceedings in the Superior Courts in the way there pointed out."

The first part of the Report of the Committee on the Law of Property on the following reference was presented: "To consider the propriety of amending the Law of Landlord and Tenant as to fixtures and compensation for permanent improvements."

It was agreed that the Report should be printed and further considered at the next Meeting.

The following reference was made to the Ecclesiastical and Parliamentary Committee: "To consider and report upon the Law of Divorce."

Adjourned till Wednesday, the 2d day of February next, at Eight o'clock in the evening precisely.

Notices for Wednesday, the 2d of February.

1. Motion, the Council having appointed Mr. Arthur Symonds to act as joint Secretary with Mr. Vizard, that where the rules and regulations refer to an Honorary Secretary, it shall be understood that they shall apply to the two joint Honorary Secretaries.

2. The first part of the Report of the Committee on the Law of Property as to Landlord and Tenant will be further considered.

3. A further Report of the Committee on Equity, with respect to the Masters' Offices, will be presented.

GENERAL MEETING, Feb. 2. 1848.—Mr. COMMISSIONER FANE in the Chair.

The Minutes of the last Meeting (the 12th of Jan. last) were read and confirmed. The following Members were balloted for and elected: William Griffiths, Esq., 7. Lower Berkeley Street; Henry Mills, Esq., Barrister, 4. Pump Court, Temple; John Robertson, Esq., Student of Lincoln's Inn, and Alexander Mac Neil, Esq., Advocate, 34. Clarges Street, Piccadilly.

The first part of the Report of the Committee on the Law of Property on the following reference: "To consider the propriety of amending the law of Landlord and Tenant, with respect to fixtures and permanent improvements," was ordered to be received.

A further Report of the Committee on Equity on the following reference was presented: "That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery." It was agreed that the Report should be printed and further considered at the next Meeting.

The following references were made to the Committee on Common Law:

1. To consider the propriety of amending the proceedings in Actions for Debts in the Superior Courts, by adopting a Writ of Summons which shall have the force both of process and of declaration, in the mode proposed by the Bill brought into Parliament in 1844, by Mr. Jervis. And also to consider whether such amendments might not be made to extend to all actions; and whether or not without limit in amount. 2. To consider whether any other of the Amendments proposed by the same Bill, or any others in connection with the objects of that Bill, might not be advantageously adopted.

GENERAL MEETING, Feb. 23. 1848. — THOMAS EMERSON, HEAD-LAM, Esq., M. P., in the Chair.

The Minutes of the last Meeting (the 2nd inst.) were read and confirmed. The following Members were ballotted for and elected : The Earl of Chichester, Stanmer Park, Sussex ; Thomas Paynter, Esq., Police Magistrate, Addison Road, Kensington ; William Wills, Esq., Solicitor, Birmingham ; R. W. Blencowe, Esq., the Hooke, near Lewes ; Wm. Rogers, Esq., Barrister, 2. Stone Buildings, Lincoln's Inn ; Ralph Carr, Esq., 14. York Terrace, Regent's Park ; Jas. Wm. Freshfield, Esq., F.R. S., Barrister, 15. Regent Street ; and Barugh Almack, Esq., 18. Sackville Street, Piccadilly.

The further Report of the Committee on Equity on the following reference, " That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery," was ordered to be received.

The second part of the Report of the Committee on the Law of Property on the following reference, was presented : " To consider the propriety of amending the law of Landlord and Tenant, with respect to fixtures and permanent improvements."

It was agreed that the Report should be printed and further considered at the next meeting.

POSTSCRIPT.

SINCE our last number, a most remarkable change has passed over the face of Europe. We have already endeavoured to describe the effect which it has had, so far as the law is concerned in that country which lies nearest to us and with which we are most intimately connected. If we thought any thing were wanted to confirm the truth of our remarks on the act of the French government rendering the appointment of the judges dependent on the government of the day, we should find it in the demands which have been made during the last two months by other countries for the appointment of judges for life. In the list of popular requirements given out by the leaders of the people in Prussia, Austria, and Italy, and in most of the smaller states, this has occupied, and most justly, a prominent place as obviously affording the best safeguard against the acts of the government, be it what it may.

There is now, we fear, no immediate prospect of the bill or *Projet de Loi* for the further improvement of legal education, introduced into the late Chamber of Paris by M. de Salvandy last year, being discussed by any legislative body in France during the present year. We have to notice, however, that the members of the Provisional Government of France have endeavoured to show the importance they attach to legal education by a decree, in which some of that body (as M. Lamartine and M. Ledru Rollin) were themselves appointed law professors. This, however, so far as they are concerned, is not intended to be acted on, and it is at present only necessary to notice the fact.

Let us hope that in the other parts of Europe better principles will prevail. Besides the demand for judicial independence, we notice with pleasure that with it have been coupled trial by jury, open sittings, *visé voce* evidence; in a word, English Criminal Procedure. We have repeatedly¹ had occasion to show how far behindhand are our neighbours in this respect, and we heartily rejoice in the abolition of the false and absurd mummery which we have already sufficiently exposed and ridiculed. Let us not, however, forget again to notice that to our own system of criminal procedure should be added, 1st. A public prosecutor; 2nd. Appointment of counsel for prisoners when they are not appointed by themselves; and as a third point—the abolition, as useless, of the inquiry by the Grand Jury,—that is, a *previous trial, whether the individual shall be tried*, and the substitution of such preliminary investigation as may be requisite, by the professionally educated magistracy throughout the country, to be judged of by the chief responsible officer and his assistants, in the metropolis or large provincial towns.

While changes such as we have mentioned are thus being made in Europe, as if by magic, does no one ask, What is to be done in this country as to those law reforms, which have been here so long demanded, and proved to be necessary. The answer to this appears to be, — appoint a MINISTER OF JUSTICE; to which subject we have devoted some consideration in the present number. In the mean time, it is to be expected that private bodies will take upon themselves the duty which would devolve on such a person. We are glad to hear that the Society for the Amendment of the Law is about to extend its sphere, to call a public meeting, and to invite the further aid and co-operation of the community at large. It may do much, if it only forces these subjects on the general attention. Another Society, which may be called the Junior Law Amendment Society, composed entirely of solicitors, is also showing signs of activity. It is stated to be “formed for the purpose of promoting the interests of suitors, and the better and more economical administration of the law;” and for this purpose has divided itself into committees, and promises reports. If this branch of the profession considers it may more usefully carry on the good work by acting separately, we can see no objection to it, and, as we stated on its original formation, its acts and proceedings deserve great attention. Who can doubt that the solicitors can effectually amend the law if they will; and that the will is not lacking this association effectually proves. We look forward, then, to the promised reports with great interest, and are glad to have the adhesion of this important body to the principle of the amendment of the law by the voluntary efforts of the profession. Nor let us

¹ 4 L. R. 52., 7 L. R. 121.

be blind to the fact, that unless the lawyers attend to these things themselves, hands will not be found wanting, to abolish, however ill qualified for the duty of re-construction. Within the last month, we have seen a prospectus of an "Anti-lawyers and Law-abuse Abolishment Association," having offices at 5. St. Dunstan's Hill, Lower Thames Street; and whatever ignorance the association may display, let us be assured that it represents a wide-spread feeling among the community. The necessary reforms, must be made; the only question is, shall they be accomplished quietly and properly, or ignorantly and precipitately.

The new Parliament has as yet done nothing worthy of the name of Law Reform. We turn, then, with some pleasure to some of our colonies, and we are glad to find that some progress is here being made. Our most important possession, India, has two great advantages in this respect, — a standing commission for reviewing and improving the law, and judges who think it their first duty to attend to such reform. The chief justice of Bombay (Sir E. Perry) and Mr. Cameron (the law commissioner) have been unwearied in their efforts to establish a small cause court in India, and have at last succeeded in having the bill for that purpose read a first time. It was to be read a second time on the 3rd of March, and we believe it has now passed. It has the support of the new governor-general.

In another great colony, hardly inferior to this in interest, Australia, we are also glad to perceive the existence of a school of law reformers, whose labours may be of the utmost importance to this rising country. Among other things, they have struck a blow at legal remuneration by lengths, by taking out the clause of our act 8 & 9 Vict. c. 119 and 124, which provides for a different mode of payment, and passing it as a substantive measure. They have also appointed a committee to consider the amalgamation of the profession, — a question which, if we mistake not, will soon be brought under public notice in this country.

Of the bills now before Parliament little need be said. We are indebted to Mr. Ewart for bringing the subject of a Criminal Court of Appeal fairly before the public for discussion. He has introduced a bill giving a general appeal as well on matters of fact as on matters of law: and Lord Campbell has subsequently laid a bill before the House of Lords restricting the appeal to matters of law. We doubt, however, whether there will be any legislation on the point this session.

The practical difficulties of legislation, and impossibility of proceeding with business, become more and more embarrassing both to Government and others. Lord Stanley has done good service by introducing a bill enabling the House of Lords, after having made progress in any particular measure which has passed the other House, to postpone its discussion to the next session, taking it up at the stage at which it was left off, and not being obliged to return the bill to the House of Commons. This is a very considerable constitutional change, and will probably, if it is not adopted, force on the necessary alteration. There can be no doubt that a revising board for bills, properly constituted, which should prepare a report on each bill, would greatly narrow the points in discussion, and much facilitate legislation. In conveyancing reform the battle-field is now to be found in Ireland. That the tenure of land is here exceedingly unsatisfactory, that the present relations betwixt landlord and tenant cannot endure much longer,

are evident; and no one can say that this is for want of legislation. It has been the unhappy fate of Irish acts of parliament to be found in the statute-book, and to be known nowhere else; and we are, if some better fate does not arrest them, to add to their number. There are now to be found in both Houses of Parliament bills which, if they pass into law, all true friends of that country will pray may never be heard of again; which prayer we are satisfied will be granted. If the sole intention was to delude the unhappy landowners of that country, landlord as well as tenant, it could not be done more effectually than by passing the Government bill, now before the House of Commons, relating to landlord and tenant, and that before the House of Lords relating to incumbered estates. We entirely acquit the Government of any such intention. We firmly believe that they wish to do what is right in both cases: nay, we shall show that in the latter bill they have had the wisdom and courage to propose a principle of the greatest value, however it may be injured by the machinery by which it is proposed to carry it into operation. It is because we believe they have only the good of Ireland in view that we venture to address them before it is too late, and to exhort the landowners of Ireland not to lose an opportunity, of which they can never a second time be sure, to gain for their country and for themselves the inestimable boon of the freedom of the land.

With respect to the Landlord and Tenant, or Tenant Right Bill for Ireland, it seems useless to discuss the provisions of a measure in which its proposer had evidently from the first but little confidence, and which has been now entombed in a Select Committee. Never was a measure more strongly self-condemned from the moment of its birth. The address of Sir W. Somerville (let us say a clear-headed and able man) on its introduction, was evidently its "last dying speech." It was intended to be put to death by its parents on the first convenient opportunity, and we are quite sure that this is the best course to pursue. We simply pronounce any measure of the kind impracticable. The greatest boon that Ireland could receive, is to be rid of litigation, but this bill would open the flood-gates to it.

But what is then to be done with what is called tenant right? by which we mean in England the right of a tenant to be remunerated for unexhausted improvements, but which in Ireland, or, at all events, in Ulster, has a wider signification. It appears to us that it must be provided for, but that it is a case, of all others, for gradual legislation. To leave it alone we hold to be impossible. It is well for some landlords to treat it with contempt, and even reproach. But it has been practically acted on in a vast amount of dealings with land, and it cannot now with safety be passed over. Even if they were wrong, the demands involved in the words Tenant Right, could hardly be entirely neglected; but in principle they are right, and must be dealt with accordingly. It is easy on paper to find difficulties as to settling questions which arise respecting them, but we know that, practically, such questions are settled daily by persons conversant with these subjects. If then the principle could be admitted as the groundwork of future legislation, much, we think, could be done by that. If instead of having the law entirely silent on the subject, the law were to speak in the absence of any agreement, this would be a point gained. Special legislation for particular circumstances, would be, perhaps, impossible, but a general rule which might operate when parties did not agree together for themselves, would not be difficult. The law allows every man to make a will for himself, and to regulate

his property as he pleases, but if he makes no will the law regulates its descent or distribution for him. We do not say that a perfect tenant right code could all at once be granted, but there is sufficient information for safe legislation up to a certain extent. So far we would go, and no further.

In the meantime, we are glad that this subject is being so fully discussed in Parliament and elsewhere. This is the best groundwork for legislation, and it has already exploded several absurd ideas in connection with this subject. One of these is, that mere occupancy can form the foundation of tenant right, which has now, we think, been universally given up.

We now turn to the Incumbered Estates Bill, and we have already endeavoured to show how important it is that this measure should be based on the right principles. A good landlord and tenant bill would indeed benefit the surface of the land, but a good bill for freeing the land from incumbrances would benefit the land itself. Now in the bill before the Lords we recognise a desire to benefit Ireland, and moreover, the divulging of a principle of the greatest value. But it appears to us, that in its present form all that we could hope for would be that the bill if it passed should not be acted on; and that great as are the evils of abortive legislation, and much as Ireland has already suffered from it — for from this cause arises a great distrust of the law — these evils are easier to be borne than those which would arise from the carrying the law into operation. The general scheme of the bill is in its material parts the same as that of last year. A petition is to be presented to the Court of Chancery, and the matter is to be at once brought before the Master, who is to inquire into the incumbrances and ultimately to order a sale of the land. Now this plan would, we think, find no great favour if the tenure of the land in Ireland essentially resembled our own. But although the laws which regulate the acquisition and enjoyment of land are the same as in this country, yet the mode in which land is held is very different. The great bulk of the estates to which this bill would apply, we apprehend stands thus. The head landlord (say a former Duke of Devonshire) has two hundred years ago granted an entail to A. for three lives, renewable for ever, reserving a rent. A. has granted to B. in the same fashion, reserving a larger rent, B. has granted to C., and so on; and thus it may often happen that there are five or six persons interested in the land before you reach those who are in the actual occupation of the land. Now each of these persons may incumber, and frequently has incumbered, his separate estate in the land, and if we understand the provisions of this measure rightly, a separate bill will be required for each of these separate estates, before the object of freeing the land from all the incumbrances relating to it can be effected. Now if this be so, and indeed if the Court of Chancery is employed we do not see how it could be otherwise, we will only ask any person acquainted with the procedure of the Court of Chancery, how much he supposes would remain of the proceeds of each estate at the end of the inquiry. The purchaser would get the estate, but the owner (the vendor) and the incumbrancers are to receive the money arising from it; all parties are to be protected and to have their interests adequately secured, and if each estate in Ireland coming under the operation of the bill is to sustain six Chancery suits in which are to be severally represented all persons having or "appearing to have" (for so runs the bill) an interest, we fear that before the Master is enabled to declare that an estate may be sold, years may

elapse, and that when sold the owner of the land, to say nothing of the incumbrancers, may find themselves in a worse position than they now are.

The fact is, that in the present crisis extraordinary remedies are required. The ordinary rules are violated to their utmost extent by the clause in the bill which says that when the Master has directed a sale, the purchaser under it shall hold the land against all the world, and yet this is the only good and really useful clause in the bill: let the Government only render this clause effectual by granting a competent machinery to work it out, and they will bestow an inestimable boon upon Ireland. Render all future titles secure, and provide for the easy transmission of land so assured.¹ Say that after a certain day all the land which has undergone the necessary process shall be free land, so far as past incumbrances are concerned, and you will give this country a chance of righting herself.

Add to this a special tribunal for the occasion, which will look not to technical but substantial justice; which will employ in the investigation of the matters brought before it some of the native Irish shrewdness; which being acquainted with legal and equitable principles will seek only to get at the marrow of each case, and will know how to act accordingly; which, not wanting in professional knowledge, shall be assisted, or if necessary controlled, by lay common sense. Let such a tribunal be formed, and we will not only insure it plenty of business, but we will answer for its disposing of it satisfactorily.

Such a Land-Tribunal is really the great present want of Ireland. Not only could it deal satisfactorily with the sale of incumbered estates, but there are at least two other important matters which could safely be intrusted to it. The conversion of renewable estates for lives, and in certain cases long leaseholds, into perpetuity, has been long demanded; and the whole question of Tenant-right might also properly be referred to such a tribunal. Neither of these questions could properly be dealt with by the ordinary jurisdictions of the country. They require special remedies. The bare appointment of a tribunal for dealing with these matters would go far to assist their satisfactory adjustment. This tribunal would in fact be the safest adviser as to further and more complete legislation.

A most extraordinary proceeding took place in Parliament just before the Easter recess, and we may truly say that should it prove the forerunner or the pattern of many others, there will be soon an end to all respect for Parliament, if not to its existence.

Some real or supposed errors had been alleged to have been committed in the examiners' office as to recognisances entered into by election petitioners, and a bill was introduced the object of which was to make the examiners' decision, which Sir Robert Peel's act of 1844 makes final, subject to appeal, giving the determination to an Election Committee, and enabling that body, with consent

A correspondent (a solicitor) of a well-informed paper, the *Spectator*, says that there is now plenty of land to be had. Yes; but he forgets that it is incumbered with all the expense, delay, and uncertainty of the present conveyancing system. In what country in Europe, where the transfer of land is free, and the title safe, and the population large, is land a drug, which the *Spectator's* correspondent says it now is in Ireland?

of parties, to alter the frame of the recognisance, and to make the alteration so made, but without the consent of parties, and in which the grossest errors or injustice may be committed, final and conclusive on all Courts whatever, be the tenour of the document what it may. The substance and effect of the bill was to protect several sitting members in their seats at all events and against all hazards, and to oust certain petitioners of their remedy of petition. Of course, in carrying this bill in the teeth of the Government and the law officers of the Crown, these protected sitting members, as well as their friends and parties, voted, and the bill came up to the Lords.

Here a strange scene was presented to the wonder of an incredulous world. All the Law Lords, Lord Brougham, who moved the rejection of this *ex post facto* law, Lord Chancellor Cottenham, Lord Lyndhurst, Lord Campbell, Lord Chief Justice Denman, all strenuously opposed the bill. There were, however, found a large majority of lay Lords to carry its second reading, and to sit from five to half-past nine, (as they will with difficulty do on the gravest national question, as they never do on ordinary occasions, even of great interest and importance,) and thus the bill was carried through that stage.

Next night Lord Brougham moved a clause declaring that the act should have no retrospective effect by way of *ex post facto* law, and should not dispose of any suit or interest now pending in any Court or in either House of Parliament. Sixteen of the nineteen who had voted for the second reading opposed this, avowing, as indeed did the preamble of the bill, that they intended to pass the law as an *ex post facto* law. But a majority, including the members of the Government, carried the clause: a dispute, however, arose on the ground that, being led to think there would be no division, some three or four of the Lords supporting the bill had retired to dine instead of sitting for hours watching over it, as they had done the night before; the motion was afterwards (on the following day) made to leave out the added clause. But finding the sense of the House again likely to go with the five Law Lords, the promoters of the measure agreed to another clause which removed much of the gross injustice and retroaction of the bill, and in this state it passed.

It is plain that some evil was thus perpetrated and done, some violent injustice, that much more was only by accident prevented from being done. One Peer, on the charge of jobbing and canvassing being ventilated, avowed that he had been applied to by the promoters of the bill to ask Peers to attend, and "if they approved the bill," to vote for it. This is somewhat strange. If they attended and if they approved, it was to be expected as a matter of course that they would vote for it. Whoever dreamt of saying to a man, Peer or other, "Pray, Sir, or pray, my good Lord, do vote according to your opinion." It would be an insult, for it would imply a doubt of the man either being deficient in common sense or common honesty. It would be like saying "Pray don't pick my pocket before witnesses." The qualification annexed to the admission of canvassing was plainly designed to save the credit of the canvassed Peers, by making it appear that they had not been asked to vote, but only to attend. It had just the contrary effect, so it was of course rejected.

The fact then stands glaring before the eyes of the whole community. There are numbers of our lawgivers in either House of Parliament, who are ready for a partizan's interest to set all law and justice at defiance, and to pass acts defeating proceedings of a judicial character, actually pending at the time. An act

providing that in all suits now before the Court of King's Bench judgment be given for the defendant, would only be one degree more outrageous than the Election Recognisances Bill; it would not be one whit more outrageous in kind.

The supporters of the bill were unfortunately not without some colour of precedent for their measure. Parliament has sometimes been moved by the sense of humanity towards suffering individuals, whom severe statutory penalties oppressed, to grant relief by passing acts suspending *qui tam* actions. In 1803 this was done to save the clergy from the suits of a common informer, for penalties on account of non-residence. In 1844 a like relief was given from actions for gambling in horse-racing. These acts of mercy are most unfortunate. They break in upon the most sound of all principles, the protection of rights legally vested. The dislike of *qui tam* actions, and of their promoters, common informers, is not unnatural. But then, why does the law have recourse to them, and rely on them for causing its own execution? Is it not somewhat too much that one act of Parliament should say to all mankind "sue for this penalty" — and when two or three persons have commenced their suits accordingly, another act should defeat them, and even saddle them with the costs of the very proceedings which the former act had enticed them to institute? In all such cases, we had far better abide by the law, and give relief to the suffering parties out of the public funds. No principle is thereby violated; no wrong is done; no precedent is set for other and worse injustice.

See the evils of breaking into a principle! See the consequences of one wrongful act! See the dangers of making laws against all justice and all consistency, under the pretence of particular circumstances! Nothing could to all appearance be more easily justified, at least excused, than the remedial acts of 1803 and 1844; yet these are cited in circumstances altogether different, to extenuate a far more violent infraction of every principle of justice, a far wider departure from every maxim of sound and honest legislation. Let this be a lasting warning to our lawgivers and our lawyers; and may we never again have reason to broach the painful subject; above all, let the House of Lords well weigh the serious nature of the scrape into which a handful of thoughtless men, zealous partizans, had well nigh gotten it in their anxiety to help one or two party friends.

Easter Term, April 27. 1848.

* * *The Adjudged Points are unavoidably omitted in this Number.*

THE LAW REVIEW.

ART. I.—THE PUBLIC MEETING OF THE SOCIETY; FOR THE AMENDMENT OF THE LAW.

IN the month of May last, an advertisement appeared in the newspapers informing the public that a meeting would be held, on the 31st of that month, for the purpose of considering the Amendment of the Law, and inviting all to attend who felt an interest in the subject.¹ As this meeting appears to us to be a very important one, whether we consider its general purpose, the persons who attended it, or the unanimity which prevailed as to the specific resolutions which were moved at it, we do not think we can do better, than give the most prominent place in our power to as full an account of it as we have been able to obtain.²

If the resolutions which were agreed to are considered separately, each of them will be found to be worthy, perhaps, of a separate meeting, and a distinct organization for carrying it; nor do we think that any one who is at all acquainted with the peculiar state of our Law, can fail to feel an interest in some of them. It is quite possible that we, who avow ourselves devoted to this cause, may overrate its importance; still we cannot but think that the temporary politics of the day must indeed have an absorbing interest, if

¹ It was, in fact, called by the Society for Promoting the Amendment of the Law, but it was open to any one who pleased to come, and was, we believe, the largest assemblage for this object that has ever been seen.

² We have been assisted in this account by some of the distinguished persons who took part in the meeting, who have kindly given us a correct account of what they said.

they divert all attention from the subjects which, without further preface, we shall now lay before our readers.¹

There were present, among many others whose names we did not learn, Lord Brougham in the chair; the Duke of Argyle, Earl Fitzwilliam, Earl Fortescue, Earl of St. Germans, Earl of Radnor, Earl of Devon, Earl of Stradbroke, Lord Lyndhurst, Lord Wharnccliffe, Lord Monteaale, Mr. Farrer, Master in Chancery, Mr. Brougham, Master in Chancery, Mr. Commissioner Fonblanque, Mr. Commissioner Fane, the Right Hon. A. R. Blake, Mr. Mackinnon, M.P., Mr. Ewart, M. P., Mr. Headlam, M. P., Mr. Serjeant D'Oyly, Mr. Commissioner Phillips, Mr. Commissioner Evans, Mr. Hill, Q. C., Mr. Roebuck, Q. C., Mr. Montague Chambers, Q. C., Mr. J. A. Gordon, Mr. Ralph Carr, Mr. James Stewart, Mr. Gilmour, Mr. H. Davison, Mr. E. S. Creasy, Mr. Lonsdale, Mr. Dowse, Mr. Houstoun, Mr. Pitt Taylor, Mr. Macqueen, Mr. E. Webster, Mr. Hislop Clarke, Mr. Vansittart Neale, Mr. Nicholls, Mr. Wren Hoskyns, Mr. G. M. Crawford, Mr. Alcock, Mr. Pulling, Mr. Lund, Mr. R. B. Chichester, Mr. J. Fonblanque, Mr. C. Webster, Mr. A. McNeile, Mr. H. W. Freeland, Mr. J. H. Law, Mr. Arthur Symonds, Dr. Lee, Mr. Vizard, Mr. E. W. Field, Mr. Robert Wilson, The Rev. Charlton Lane, Mr. Patrick Johnson, Mr. Griffiths, Mr. Caldecott, Mr. W. Hawes, Mr. J. H. Elliott, Mr. Ingram Travers, Mr. C. F. Humbert:

The noble chairman, after expressing the great pleasure which it afforded him to occupy the chair at that meeting, and the satisfaction he derived from the great progress which the Society had made within the last twelve months, both in Parliament and out of doors, said, that having lately delivered a very long address in the House of Lords on the subject of law amendment, he should make none here on the present occasion, except to state what had been done in improving

¹ Lord Brougham, in his admirable speech of 12th of May last, said, "The topics I am to handle are indeed not at all of the class termed vital questions, of which it was once said, not more wittily than truly, that while they never failed to excite the greatest interest, their importance was so small that it signified nothing at all which way they were determined. Those questions which I am now to discuss are, on the contrary, of incalculable importance, how dry and even forbidding soever they be when in debate." — P. 2.

our jurisprudence, before reading the report of the Society's council. He therefore took a very cursory review of the success which had attended the efforts made since 1828, in procuring amendments of the law. He said that on his motion, in 1828, various commissions had been appointed by the Crown to investigate the law of actions, the laws which related to real property, the laws of debtor and creditor; and he had, in 1831, issued the Criminal Law Commission, and, as the result of their reports, important and most useful improvements have been effected in the laws of arbitration, execution, pleading, and judgments; while, as regarded the laws of debtor and creditor, although the alterations made in them were the subject of great controversy among the mercantile part of the community, and although they might deserve re-consideration by the Legislature, yet it was unquestionable that great and important improvements had been consequent upon the recent amendment of these laws. As respected the law of real property, some of the evils which had afflicted the country in the law affecting disputed titles, had been greatly abated; and it had now been rendered impossible that such things should recur as once happened with an estate in Cheshire, which, having been 150 years possessed by one family, and been mortgaged, sold, exchanged, and re-sold, was, after all, found not to belong to the existing owner, but to a total stranger to him, one then in reversion only, to an estate tail unexpired, and restitution had to be made of the property. Now the law, as amended, rendered such a monstrous state of things as that impossible, and constituted forty years as the utmost, but making twenty years undisputed possession a general title against all mankind; and doubtless facilitated the transfer as well as the mortgaging of land. Our neighbours, the French, had adopted a shorter period, which we could not but envy; for they had made ten years undisputed possession a valid title against all mankind. Great amendments had also been made in the criminal code: its sanguinary aspect had been much mitigated, by the total abolition of all capital punishments, excepting in the case of those crimes which the natural sentiments of all mankind testified ought

to be visited with death, viz., murder and treason, which, involving the peace of society and its very existence, includes within itself murder, rapine, fire, and all kinds of crime. The commissioners upon the subject of a digest of the criminal law, and particularly of all that portion of it which refers to the definition and the punishment of crimes, had reported fully on that great head; and he (Lord Brougham) had introduced a Bill, now in its progress through Parliament, for giving this country, its people, and its judges, the inestimable benefits of a complete criminal code. The code of criminal procedure would immediately follow, and upon that the learned commissioners, Messrs. Starkie, Ker, and Amos, were working very sedulously, and he believed they would shortly report. These were objects which that Society had laboured to promote, and they had cheering encouragement, from what had already been accomplished, to strive to do the much more which yet remained to be done. As a practical illustration of the benefits which had already resulted from their labours, aided by the Legislature, he might remind them of a fact that was disclosed at a former general meeting. The Terms Bill, propounded by the Society, and which he had carried through Parliament three years ago, was the means of saving the Duke of Cleveland's estate 5000*l.* in conveyancing expenses of one year, as his solicitor stated. This Act had been much abused at the time of its introduction; but both lawyers and laymen now were agreed in considering it a very beneficial alteration in the old law; and though that great amount might not be of much consequence to the Duke, yet the same economy would result from the law to other persons to whom it signified a great deal. Still much remained to be done in the way of improvement in these laws; and he (Lord Brougham) was glad to find that notwithstanding the dry and uninviting nature of the subject, the House of Peers were becoming alive to its importance, and gave him (Lord Brougham) a patient and attentive hearing when he addressed them upon it at large. His fellow member of the Society, the Duke of Richmond, would have been present there that day, had he not been called upon to preside over a meeting of an institution

for that most important object, in furtherance of which the Law Amendment Society would, he was sure, cordially co-operate, the reformation of juvenile offenders. To his Grace belonged the honour of having incited that society in its laudable and useful career, and it was his (Lord Brougham's) happiness to be enabled to say that all the efforts and institutions directed to reform young culprits had been attended with eminent and consolatory success. France and Belgium had followed the example of this country in these philanthropic labours, and Mettray was well known to the world as the seat of one of the earliest of these invaluable institutions. We had also an earlier and kindred establishment in Warwickshire; it was a model farm-house, where criminals discharged from our gaols after the expiration of their term of imprisonment, were employed, and afforded an asylum until they were enabled to retrieve their character by a moral and religious system of training. The noble chairman concluded by reading the report of the Council of the Society to the meeting, as follows:—

There is no country in the world in which voluntary societies for the furtherance of public purposes so abound as in Great Britain: art, science, education, charity, in all their ramifications, have their general or their special institutions: their mere titles would occupy a volume. But while subjects of far inferior importance have thus occupied the attention of the public, and innumerable associations were most munificently supported by private contributions, one great object appeared to be neglected. It was not till the year 1843, that a hundred individuals could be found who would combine in the formation of a society for promoting the amendment of the law. Five years have now elapsed, the number of associated members has greatly increased, and the publication of the reports and proceedings of the Society has given practical evidence of the nature and purposes of its institution. The Society is no longer a speculation, and its council are now of opinion that the time has arrived when they may appeal to the public for a larger measure of co-operation and support. With their past means, they hope it will not be thought that they have been wanting in activity; with their present means, they may continue to be useful; but they feel, that in order to accomplish their greater purposes, further aid, both personal and pecuniary,

is indispensably necessary. They have, therefore, considered it right now to address the public in order to attract more general attention to the objects and uses of their association.

The purpose of the Society is to collect and diffuse all information which can tend to the simplification and improvement of the law—to suggest the means by which, it believes, that the administration of justice may be rendered less dilatory, less expensive, and less uncertain—to add to the value and security of real property, by facilitating its transfer—to aid personal rights, and to defend from personal wrong. For these purposes, whenever a subject is suggested by any member, the propriety or expediency of its discussion is first examined by the council: it is then sent for investigation to a committee, and, on the report of the committee, it is debated in general meeting of the whole society. Nothing is done hastily, nothing without publicity, nothing without time and opportunity for deliberation. The result has been the printing of reports on many most important subjects, of which several have attracted the attention of the legislature, and some have become the foundation of legislative enactment. It is on this faculty of suggestion that the Society mainly relies for its success—*petimusque damusque vicissim*, it asks hints, not from the learned only, but from all who see, or suppose they see, an evil, or a danger; from all who see, or suppose they see, a remedy or an improvement. On these hints they work, and present the results to those who hold the political station which can render them effective. Much, therefore, which individual knowledge may not possess, or which individual diligence could with difficulty collect, is presented for use in a practical form; and the sources are pointed out, whence further aid in details (if wanted) may be obtained.*

The Council do not attempt to enumerate all the subjects on which the attention of the Society has been, and still is, occupied.

The Court of Chancery, inaccessible to the poor, vexatious to the rich, dilatory and expensive to all, with a theory almost perfect in its equities, with a practice almost unequalled in its imperfections, was almost, as of course, the first to receive their attention. That any private society should have attempted to grapple with this monster evil may be held as no inconsiderable degree of presumption. Royal and parliamentary commissions have failed; new rules and orders, and again new rules and orders, framed with all the skill, experience, diligence, and astuteness which judicial talent and integrity of purpose could bring to their consideration, have not yet produced the desired certainty of practice,

the desired speed of procedure, the much desired cheapness of relief. And yet the Society hopes to succeed, because in addition to competent knowledge they have members who bring to the work of renovation minds unfettered by ancient habit; not working in a groove, worn deep by continual use; minds in which respect has not become veneration; new minds, active in discovering the sources of evil, though as yet immature for the suggestion of remedy.

But if the Court of Chancery has the unenviable pre-eminence of suggesting itself to popular opinion as the first object of law reform, there is another and a higher tribunal well entitled to dispute its precedence, — the High Court of Parliament — not in its political, but in its legislative, capacity — not in any question of the purity of its intentions, but in respect of its incapacity to convey those intentions in reasonable language. It would be a mortifying, though an instructive, task to ascertain how much of each volume of the statutes at large is occupied in correcting the errors, uncertainties, insufficiencies, impertinences, and other imperfections of its predecessors in the series. To this the Society has directed its special attention; and it is not without hope that some of its suggestions are on the eve of adoption.

But if the construction of an act of parliament be a puzzle to popular intelligence, what shall be said of a conveyance of real property? — Is there one man in a thousand, of all the thousands interested in such possessions, who can tell by what form of law he is to get rid of a single acre of his land? On this most serious subject the committee on the law of real property have made several reports, and they are still occupied in its further examination. They may refer to the act for rendering assignments of terms of years unnecessary, as an instance where the legislature has acted on the reports of the committee with great benefit to the public.

The law of debtor and creditor, with its consequences of bankruptcy and insolvency, next attract a place in public attention. For more than fifteen years, there has scarcely been a session in which an act has not passed on these subjects; and yet persons most affected by the evils to which trade is exposed, and most practically conversant with the law intended for its relief, declare that the law yet remains uncertain and insufficient.

The jurisdiction and procedure of the ecclesiastical courts, the law of wills absurdly subjected (even under the same instrument) to two jurisdictions (if the property left be both real and

personal), the important questions relating to marriage, the law of divorce, now exclusively applicable to the rich, are subjects loudly calling for amendment.

The administration of the criminal law (a never ceasing anxiety), more speedy, yet more deliberate, trial, more certain and more efficacious punishment, continued modifications of our once sanguinary system, reformatory punishments of secondary severity, a court of revision or appeal, are among our exigencies.¹

Nor is the Society unaware of the propriety of looking to that which is the source of all improvement,—legal education. They cannot but acquiesce in the general opinion, that, on this point, the great law colleges, the Societies of Lincoln's Inn, the Middle and Inner Temple, and Gray's Inn, have not adequately fulfilled the purposes of their institution; they have been places of resort, and nothing more. Until lately, no part of their funds, though consisting of accumulations and contributions, raised by a species of taxation from the members of the profession, were applied to public purposes. On this subject, the Society would be disposed to ask for some controlling senate, which should assimilate the legal to the other universities.

The Council hope, that in thus showing some portion of the extent of the objects of their institution, they have also shown how deeply and how extensively the public are interested in their success. Landed proprietors, magistrates, clergymen, merchants, bankers, traders, have each their several questions of law, have each something to ask, or something to complain of. The Society offers them a rallying point for communication, a council for advice, an organ for suggestion: are they not entitled in return to ask them for co-operation, assistance, and support?

The Earl of Radnor rose to propose the first resolution, which was to the effect, "That this meeting concurs in the views expressed in the address of the Council of the Society in their report for promoting the amendment of the law, and considers the Society entitled to the continued and increased confidence and support of the public." He said, it might be considered presumption in him, surrounded as he was by noblemen and gentlemen eminently conversant with legal questions, upon which he (Lord Radnor) was scarcely competent to form an opinion—to address them in support of the first resolution; but, at the same time, he could not but express his deep admiration of their praise-

worthy endeavours in connection with that Society, to improve the processes of the law, which were onerous, most expensive, and inconvenient to the public in general, and which were supposed to be so very profitable to the legal profession; an opinion, however, to which he was not inclined to subscribe, unless prepared to admit what he could not admit; viz., that their services and labour were very much overpaid. He fully concurred in the necessity of great improvements, both with respect to the Court of Chancery, and the legislative enactments of the Court of Parliament. He must confess that he found himself at fault when he endeavoured to comprehend the meaning of an act of Parliament; and the desirability of drawing up those acts in an intelligible form was patent to every body. He could speak from personal experience of the dilatoriness of proceedings in the Court of Chancery, his brother and himself having been both wards in that Court, after their grandfather's death, at which period a suit had been commenced which did not conclude until several years after he (the Earl of Radnor) had attained his majority. He had much pleasure in moving the first resolution.

The Earl of Devon, in seconding the resolution, said that he could bear his testimony to the diligence, activity, and attention of the council and officers of that Society, which did not consist of a set of gentlemen who were desirous of putting themselves forward ostentatiously or interestedly as law reformers; but was composed of a talented, highly respectable, and practical body, who were ever ready, impartially and deliberately, to discuss any proposition for law reform, and to use their best exertions in such improvement of the law as would tend to the advantage and convenience of the entire community.

It was important the public should know that this Society gave an opportunity to every man, of whatever profession or calling, who had arrived at the conclusion that the law as it affected him in his business or his acts required amendment, of making his views known with the certainty that they would receive a full, calm, and impartial consideration. The resolution was carried unanimously.

The Earl of Stradbroke moved the next resolution, which was, "That the present state of the law of real property is now universally admitted to be exceedingly defective, and to be ill-adapted to the present wants of society, and that a shorter and simpler and safer mode, for the transfer of land, and for establishing the title thereto, is demanded for both Great Britain and Ireland." In supporting the resolution, he remarked that a relative of his had sold some of his estates, but such were the difficulties and obstructions in the way of the transfer, that between two and three years elapsed before it could be completed, and great expense and hardship had been entailed upon the vendor, upon whom the expense exclusively fell, because the purchaser generally took the legal cost into account when about to purchase, and the party who sold generally did so, not from choice, but necessity.

Mr. James Stewart said, that as one of those whose daily business it was to concern himself in dealings with property, he ventured to second the motion. The noble earl might be considered to express the sentiments of the landowners of this country, as to the state of the law of real property, and he (Mr. Stewart) would say, that the great majority of the profession of the law was of the same opinion. There had been repeated investigations of that subject, which had always ended in strong condemnations of the present system of conveyancing, and in recommendations for its amendment. The only question was, how these latter could be carried into effect most speedily and advantageously. They were now enjoying this further advantage, that the whole subject was under the consideration of a learned and competent commission, which had been appointed by the present Lord Chancellor. But he would remind the meeting of one important fact. Supposing these commissioners were to report as favourably as they could wish; suppose they were to recommend an entire alteration of the present system, and to accompany that by a complete and well-grounded plan for effecting the desired reform, by what means was that to be carried into law? There was no department in the state charged with this duty. Nearly thirty years ago a registry

of deeds had been recommended by a competent body, but after one or two attempts to pass a bill for that purpose, no further care was taken about it. In the absence of any machinery of the state for carrying amendments of the law, it was only by means of the Society, in whose room they had now met, that measures of this nature could be made successful. They could diffuse information respecting it, they could discuss its details in their committees, they could have public meetings like the present, which would show a union of many persons interested in bringing it to a successful issue. It was for these reasons that he trusted that the Society would be properly supported, not only by lawyers, who had perhaps little influence as a body, but by the public at large, for on this subject a union of landowners and lawyers was necessary, the one to say what should be done to remedy the admitted evils, and the other to give the proposed remedy an opportunity of having a fair trial.

The Right Hon. A. R. Blake supported it, and said that his experience as a Master in Chancery (in Ireland) had convinced him that some mode of cleansing out the Court of Chancery was more necessary than one for doing the like to the sewers of London. The multifarious duties to be performed by the masters of that court rendered it absolutely impossible, however superior their powers of mind, for them satisfactorily to perform their duty; and a re-adjustment of their functions was imperiously called for.

The resolution was then carried unanimously.

Mr. Headlam, M. P., moved the next resolution:—"That the great expense and delay arising from the present system of Chancery procedure, and more especially of the Masters' office, are now admitted by all, and that a timely remedy is necessary to save the Court of Chancery from general and deserved distrust." He expressed his regret at the absence of Mr. Bethell, who was to have been present to-day, and given the weight of his name and authority in support of the proposition now to be adopted by the meeting. The abuses and defects of the Court of Chancery were, however, so well known and admitted, that there was no reason to fear in such a meeting as the present, any difference of opinion as

to the existence of the evil, whatever disagreement there might be as to the precise nature of the remedy that ought to be adopted. It was a subject of great regret and humiliation to law reformers to reflect, that notwithstanding the great importance of the subject — notwithstanding the attempts that had been made by men eminent in authority, and the continued and increasing attention now given by the public to the subject, still the Court of Chancery, now in this year 1848, was by general admission quite incompetent to grapple with the cases that properly came within its jurisdiction, and to fulfil the duties imposed upon it by the constitution. Still he thought that there was good ground to hope that not many years would now pass over before a marked and real change would take place in this most important tribunal, rendering it more suitable to the modern exigencies of society. He had been this session a member of a committee of the House of Commons, which had collected a mass of valuable evidence concerning the fees of that court. That committee had unanimously adopted some very important resolutions, which he had no doubt would ere long be embodied into a law, and would, he believed, effect some very valuable improvements. He also called the attention of the meeting to a measure that had recently passed the House of Commons, for winding up the affairs of Joint Stock Companies. He said that there was no subject in which the powers and process of the Court of Chancery had been found more defective than in taking partnership accounts; but if this were true of partnerships consisting of a limited number of persons, much more was it the case with those very numerous bodies called Joint Stock Companies. This bill sought to deal with these very difficult cases by giving to the Masters greater powers, and enabling them, with the assistance of subordinate officers appointed for the purpose, to do all necessary acts, and make orders for winding up the complicated affairs of these companies.

Should this bill succeed, it would necessarily lead to further and more extensive alterations in the whole constitution of the Court, as, if this new machinery was found

suitable for these, the most difficult and complicated cases submitted to the Court, it might also be beneficially applied in many other instances where now much useless delay and expense were incurred. He had himself expressed in a report of the Society, a strong opinion of the radical defects incident to the present division of labour between the Judges of the Court and the Masters.¹ He had seen nothing to make him doubt the truth of the opinions he then expressed, and he could not but think this measure would prove a step in the direction he recommended, inasmuch as it would virtually place under one Judge, namely, the Master, the whole superintendence of the most difficult causes. He would not detain the meeting further than by saying, that he did not ground his hopes of the future improvement of the Court, so much on what either had been done as yet, or on what was now in progress, as upon the improved spirit that was now manifest in all parties professionally connected with the Court. When the defects of the Court were generally admitted, the only question was, what changes should be adopted. It would, indeed, be a strange thing if the united intellects of judges, barristers, and solicitors, should be found incapable to provide a sufficient remedy.

Mr. Vansittart Neale seconded the motion, which was carried unanimously.

Mr. William Hawes moved the fourth resolution:—
“That, considering the unsettled and conflicting state of the law of debtor and creditor, and the great importance of maintaining credit, this meeting is of opinion that this branch of the law requires immediate, careful, and comprehensive revision;” and condemned the present law as affording impunity to the fraudulent debtor, whilst it crushed the innocent object of misfortune. As the law now stood, no protection was given to the creditor who gave credit on the faith of the debtor’s promises, because the onus of proof of fraud was thrown upon him. The debtor who applied to the Bankrupt or Insolvent Court to be relieved from his liabilities, should be bound to show that he had not contracted those liabilities in fraud. He complained that this society, which had inter-

¹ This report is printed, 6 L. R. 315.

ferred to save expenses to the rich in the transfer of estates, had not interfered to protect the small trader, by giving him a sure and speedy remedy against his debtor. The public at large were far more interested in a good law of debtor and creditor, than in reforms in the Court of Chancery. The loss by bankruptcy and insolvency in this country—or rather, the total number of failures—exceeded 50,000,000*l.* a year; and if they were to go on allowing, and in fact encouraging, men (for such was the operation of our bankrupt and insolvent laws) to repudiate their debts, they must not be surprised if the principle extended more generally, and a composition of the national debt should not be thought impossible. At present it was only the more honest of those who failed, who resorted to the Bankruptcy Court. The majority effected their object by means of a composition, which they forced their creditors to accept by the threat of taking advantage of the bankrupt laws. This was especially the case, he was informed, in the drapery trade. He believed much of the commercial distress we had experienced was owing to the recklessness with which debt was incurred, in the absence of any punishment for that offence.

Mr. Gausen seconded the resolution, concurring in the opinion, that had there been a law to punish fraudulent and reckless debtors, the commercial difficulties which, on various occasions, had been experienced during the last quarter of a century, might in a great measure have been avoided.

The President assured Mr. Hawes that he did not differ from him in principle on this subject. It was on the principle that the debtor, not having paid his debt, was *primâ facie* in the wrong, that he had opposed the present Lord Chancellor's bill, which imposed the onus of proof on the creditor. The present law of debtor and creditor undoubtedly required the consideration of Parliament.

The resolution was carried unanimously.

Mr. Roebuck, Q. C., moved the next resolution:—
“That in order to devise, mature, and carry out the necessary amendments in the law, it is absolutely essential to appoint a minister of justice, or to establish a department of state for the performance of these duties.” At present there was no department upon which the responsibility of

this duty fell; and what was meant by the resolution was, that all that was directly or collaterally connected with the administration of the law should be placed in the hands of one responsible officer, whose duty should be to set his mind, and the minds of those under him, to the reform of the law and the administration of justice. He knew that there were objections to the title "Minister of Justice," as being un-English, which might be removed by the substitution of the title "Secretary of State for Justice." It was a disgrace to this country that no such department existed. The administration of English justice extended over the whole globe, but as administered in many cases, with all its delays, its vexations, and expense, it was not English justice but English injustice. Let this society continue their exertions until they succeeded in getting such a department established, and they would then be in reality as well as in name, a Law Amendment Society.

Mr. Commissioner Fane said, he had great pleasure in seconding the resolution, for he felt that in the carrying of that resolution was involved the ultimate success of every other resolution, that had been or might be proposed that day. Knowing the great desire which prevailed in every part of the community to see our laws and legal institutions put upon a better footing, he had often wondered why so little progress had been made in carrying those reforms, which all men longed for, and so urgently demanded. Reflection had convinced him that our little, or rather no progress, was attributable to our having no one officer of state whose peculiar duty it was to devote his whole time and thoughts to the superintending the administration of justice, and, as an incident to that duty, examining in what respect our laws or institutions were faulty, and planning and maturing all proper reforms. It was said, that the Lord Chancellor was minister of justice, and that such duties belonged to him. If so, our no-progress was at once explained, for it was impossible that he should perform duties so onerous, in addition to those under which he was now staggering. Judge of appeal in the highest court in the kingdom, he had to correct the errors of no fewer than four eminent judges, and in so doing,

not only to touch their reputation, when he reversed their judgments, but to establish precedents, binding for ever. Was not this duty alone amply sufficient to occupy all the thoughts and exhaust all the energies of any one man? But besides this, he was Speaker of the House of Lords, compelled to devote many hours in the week to the service of that house, he was a cabinet minister, deeply engaged in the politics of the day, he was the greatest dispenser of patronage in the country, having the distribution of eight hundred ecclesiastical benefices, and of innumerable offices in the law. In the Court of Bankruptcy alone he had nearly a hundred places in his gift. If he exercised all this patronage conscientiously, with an honest anxiety to forward the interests of religion and the due administration of justice, the considering the claims of the innumerable applicants for preferment could not fail to be a very burthensome part of his duty. To all this labour was to be added, according to the supposition, a duty the most burthensome of all, — that of considering and maturing projects of legislation. Here, then, was the explanation of our want of progress. The law, contrary to its well-known maxim, demanded impossibilities. It demanded of human strength what no human strength could perform. The remedy was obvious, — the adoption of the proposed resolution. With a minister of justice every thing would become comparatively easy : for, besides having ample leisure to consider every subject, he would of course have the aid of a proper staff of subordinates, both to prepare subjects for his consideration, and to carry out his views when sufficiently matured. Without some such officer, he (the commissioner) was well assured that no real progress would ever be made in law reform, and therefore he trusted the meeting would support the resolution.

The resolution was unanimously adopted.

Mr. M. D. Hill, Q.C., moved, "That the present state of the criminal law, more especially that part of it which related to secondary punishments, was highly defective."

This, he said, was a subject which, of all others, admitted, and indeed required, the aid of laymen. Admitted, because it was one to which an acquaintance with law as a science

was not necessary to enable any person of observation and reflective mind to give most important assistance. Required, because, until the true principles of punishment should be received among all classes, and disseminated through the public at large, it would be positively injurious to make sweeping changes, since the great benefits arising from the administration of criminal jurisprudence were mainly dependent on the principles acted upon by the Courts being such as found their response in the feelings of society. Now such a diffusion of knowledge could scarcely be expected, unless larger means of influence could be brought into action than any one body of men could possibly command. The history of progress on the important subject of penal inflictions was instructive. Many who heard him were old enough to remember when the terror of punishment was the sole motive on which the legislature appeared to rely for the repression of crime; and when that terror was expected to arise from the magnitude of the penalty as it stood in the law books. Acting on this view, our code had become one of blood; and although the practice was far milder than the theory — for the fallacies of the head were often more or less corrected by the instinctive feelings of the heart — yet, after all, it had left behind it an awful and memorable lesson against that prodigality of legislative power which vainly hopes to produce good effects by vindictive and sanguinary denunciations and examples.

Excellent and able men, among whom Sir Samuel Romilly stands pre-eminent, seeing that the means did not produce the end, but, on the contrary, that crime was rapidly increasing, came to the conclusion that it was not the severity, but the certainty of punishment, which deterred offenders — that a degree of severity which revolted the public mind operated to screen offenders, by multiplying the chances of escape through the merciful feelings of prosecutors, witnesses, and juries; and, consequently, that certainty in the execution of the law was the object to keep in view, and not a severity of denunciation which defeated itself.

Our criminal law (he continued) had now for many years been from time to time revised and mitigated in pursuance

of this principle, the soundness of which, as far as it goes, no man denied; but its sufficiency to secure the repression of crime was, he said, another matter.

And not only had the law been mitigated in severity, but, with reference to the same object, other changes had been introduced. The expenses of prosecution were formerly thrown on the party injured; they were now borne by the public, to the great increase of prosecutions, and consequently to the removal of one chance of impunity, formerly enjoyed by criminals. The police of the country had, as the meeting well knew, been greatly enlarged, and hence the chances of detection were multiplied. And yet, after all, how distant the approach to certainty of conviction! It was (he said) matter of debate whether crime was at all diminished. Many were strongly of opinion that it is on the increase. How this might be he would not stop to examine; but at all events crime flourished far too much not to show conclusively that certainty of detection and punishment could not be relied upon as any potent check to its commission.

With regard to one crime, of forgery, there were the means in existence of measuring the approach to certainty, which had been made since the changes to which he had adverted. While forgery was punished with death, it appeared by a careful register kept by the associated bankers, that for every forgery punished, 165 were committed. Whereas, since the penalty had been mitigated, the proportions, instead of 1 in 165, had been raised to 1 in 100. But this fact, while it showed that the principle on which the alterations had been made was sound, also showed that it was quite insufficient to accomplish of itself the object in view. Indeed, how could it be otherwise, when certainty, even where it existed, did not produce the effect which had been anticipated. There were many employments in this country which inevitably shortened the lives of those engaged in them; yet such avocations never wanted candidates to fill them. He had visited last year the Cornish mines: he found, among other employments of the work-people, two occupations in particular, one healthy, the other most deleterious, all who pursued it dying at an early age. What did the meeting think was the difference of

wages between long life and premature death? *Half-a-crown per week!* So true it is that even if certainty could be attained, if it were a *deferred* certainty, it would not avail. These facts might be varied and multiplied *ad infinitum*; and he could wish to see the inferences to which they pointed enforced by all who felt their importance. They showed to his mind most clearly the error of depending on the deterrent effect of punishment. The great proportion of relapsed criminals was another fact even more cogent than the former. Cases of persons who had been committed to prison many times came frequently under his notice. There had been instances of the same individual having been committed to the same prison more than ninety times!

He therefore submitted that punishment, to be effective, must be reformatory; and if that were so, its duration must be regulated, not as at present, by a supposed relation between the magnitude of the crime and the magnitude of the penalty (which, in truth, had no common measure), but with a steady determination to prevent a criminal from returning to society until he was reformed, and his reformation well ascertained.

He was aware that the adoption of such a principle was not to be expected for years. He should himself be strenuously opposed to it until it had been sanctioned by public opinion. At present it was only *militant*—sooner or later it would (he firmly believed) become *triumphant*. But so long as it was opposed to the views generally entertained, he for one could not expect that it would work well, even if he could hope for its adoption. This consideration, however, only showed the more clearly how necessary it was that the Society for the Amendment of the Law should not consist of lawyers merely, but of all classes; in order, first, that the questions proposed for debate should be submitted to a searching discussion, which, being conducted by men of different pursuits in life, would exhibit every point in all the lights in which it could be presented; and next, that results so obtained should be spread abroad through the nation at large. Mr. Hill concluded by reading the motion.

Dr. Mackenzie, D.C.L., seconded the resolution.

Lord Monteagle moved the thanks of the meeting to their noble and learned President, not only for his presence there, but also for his earnest and consistent and practically useful course through life ; and he hoped he might long remain before them as an example of what one man could do. With regard to the laws as to the conveyance of property, he would state a fact which had come before him in the committee of the House of Lords, on colonisation, over which he presided. He had been speaking to a witness of the importance of facilitating the rise of the labourer in the colonies to the condition of the small landowner ; and the reply was, " The law of England prevents that ; you have forced your laws as to the conveyance of real property on us¹, and the expense of making the conveyance under those laws is so much beyond the cost of the land in the case of small purchases, that individuals who would otherwise buy land, and raise themselves to the condition of the middle classes, are prevented." He (Lord Monteagle) was convinced that such a law of conveyance was not the best means of cementing the union between our colonies and the mother country.

Earl Fortescue seconded the motion, which was carried with acclamation.

Lord Brougham, in acknowledging the compliment, said the fact just mentioned by his noble friend was most important and striking, as showing the mischievous character of that gross, expensive, and riskful system of conveyancing with which this country was now afflicted.

The meeting then separated.

Suppose some country stranger and wayfarer, it may be, also, a suitor of the Court of Chancery, had been walking up Regent Street on the 31st of May, and seeing a crowd round the doors of No. 21, had strolled in thinking perhaps to find an auction going on, he would, we think, have been agreeably surprised when he got up stairs. He would have found a large room full of earnest faces, and heard words uttered which seemed to be from the heart ; and he would probably

¹ We have already noticed this grievance. See 4 L. R. 169.

have asked one or two questions. He would soon have guessed the name of the chairman ; but who is on his right ? " Lord Fitzwilliam." And who on his left ? " Lord Lyndhurst." And if he had pursued his inquiries, he would have found that those two noblemen represented the two chief classes in the room, noblemen, members of parliament, and persons of property on the one hand, and lawyers of all classes on the other. He could not have been long ignorant of the object of the meeting. Some such words as these would have reached his ears,—" the great expense and delay of Chancery procedure, more especially of the Master's Office, require a speedy remedy ;" " a cheaper, shorter, and safer system for the transfer of land and the assurance of title thereto, is now demanded ;" " that a law university should be founded and established by the aid of the Inns of Court ;" " that it is essential to establish a Minister of Justice, or department of the state which shall carry on, mature, and complete the necessary amendments of the law ;" and other similar " good resolutions." He would have found also that no one opposed all this, that the meeting, though made up of men of all parties in the state, were here unanimous ; and when he also discovered that in this assembly were to be found the heads to contrive and the hands clothed with the power to carry the necessary measures, he could not fail to be delighted.

But bye-and-bye the meeting would disperse, and he would see all the great and learned persons, as well as the ignorant and insignificant, walk away, and he would begin to ask what was gained by all that he had seen and heard. It was true that these great evils were talked about, but what had the meeting done to relieve them ? On this we have a word to say, and the report presented at this meeting enables us to tell him.

In the first place, it is no small gain to the cause of law reform, that in our public streets and at noonday the great defects of our law and the necessity of amending them, are now proclaimed without one dissenting voice being heard. These opinions may have been freely held before, broached in pamphlets, and gossiped over after dinner ; but now, for

the first time, the great, the noble, and the learned, publicly admit the evils, give them a distinct form, and invite the proper remedies. But then some people get impatient, and say show us results? and to answer the question, the exact results intended must first be ascertained. Now, alas, slow and weary must be the way of the law reformer; to be safe and really useful, he must pursue a cheerless and most uninviting path. He has no sudden or immediate triumphs to boast; he can strike no one blow which will change the fate of nations; the complicated machinery of the law can only be safely touched by the skilful hand. Great changes may be made, but to make them successfully or even safely, the public mind must be first prepared, and professional objections must be fairly met and overcome by equal professional skill. It is this great but thankless work that the Society is doing, and when this is understood, we have no difficulty in answering the question.

Already, as we believe, the whole prospects of the law reformer are changed. It is now proved that many great points which, however desirable, were deemed impossible to attain, may speedily be carried. It has been shown how this may be done, where the real disease lies, and how it may be remedied. In one word, all that is now wanted is a willing and competent government, and they will find the work made ready to their hands.

It is an idle inquiry as to how much of this triumph is due to the exertions of the Society in its collective capacity, or to the particular exertions of its individual members, or others not members at all. It matters not by what disciples the devils have been cast out, if we are free from them. We assert, without fear of contradiction, that during the five years in which the Society has existed, greater attention has been paid to its objects than at any former period, and that a spirit of philosophical investigation has been raised, by means of which measures have already been proposed or passed of much greater extent and value than have previously been attempted. But if we rightly understand the great *mission* of the Society, it is not so much to place on the statute book specific acts, as to force or press on the Government the necessity for them, and to obtain the co-operation

of the public in their favour. Let us see briefly how far they have been successful in this. Since the formation of the Society they have by all means in their power brought under the notice of the public the subjects of the second and third resolutions. 1st, The evils of the present system of conveyancing, and the importance of facilitating the transfer of land; and 2d, the necessity of a reform in the Court of Chancery. Now we consider that the House of Commons, although it may not always represent by its votes the real opinions of the country, yet it certainly does so in its debates. We have had very recently a measure before that House, which involved the consideration of both these subjects, the Irish Estates Bill, and we shall find that the greatest unanimity prevailed on these points. We are tempted to make one or two extracts from one of these debates, that of the 12th of July last. We will take them in the order of the speeches.

Mr. Sadleir (who opposed the bill) said, "What they wanted in Ireland were some practical and substantial facilities for the sale of land, and these facilities were only to be obtained by measures which would diminish the expense and curtail the delay which now absorbed so large a portion of the produce of the sale. These consisted in the defective state of the registry, the enormous and unnecessary expense of their lengthy and voluminous conveyancing, and the expense of searches, not only for mortgages, but for wills in the Prerogative Court." The honourable member further said, "A great part of the expense connected with the sale of land in Ireland arose after the decree was obtained, and while the matter was pending in the Master's Office. This arose from the multiplicity and variety of the business which the four Masters in Chancery had to get through."

Sir James Graham, who supported the bill, said, "The view which I took of the bill, as it came down from the Lords, was an objection connected with the delay and expense of proceedings in the Court of Chancery, to which the honourable gentleman has reverted. It was in that delay and expense that I saw the great difficulty. I am quite satisfied that if the adjustment of these questions, in the present condition of property in Ireland, be left exclusively to the Court of Chancery, to be carried into effect with respect to the rights both of encumbrancers and heirs, that no practical facilities for sale can be given. I am satisfied that every facility must be given for the conversion of land at its full value into money; that full protection must be given, ensuring that all creditors shall be paid, and that the residue shall wait on the inheritance, but at the same time that every facility must be given for the sale of property." Sir J. Graham also said, on the debate of the 14th July, that a revision of the stamp laws should accompany this measure, and Mr. Bouverie moved a clause reducing the stamp duties.

Mr. Bernal Osborne, who supported the bill, said, "The safety of Ireland was at stake, and unless the law were altered in a summary way, you would have

no property left. Here was the opinion of Sir Anthony Blake, a Master in Chancery.¹ He said that his experience as a Master of Chancery in Ireland had convinced him that some mode of cleansing out Chancery was more necessary than any other bill, public or private, in Ireland. Unless they did that, Ireland would always remain in the same state in which she now was. The honourable member for Carlow had said that upwards of one million and a half of land was for sale in Ireland. Why was it not bought? Because your present state of the law was so expensive, titles were so intricate, and the transfer of land was so dear that no man could attempt to buy land in Ireland. The lawyers were directly interested in keeping up the intricate statute of limitations. He quite agreed that you must have a new register of estates in Ireland, such as you had in Belgium. Would it not be better for England to give parliamentary title to estates in England? It would be found that there was a necessity for probing this wound to the core. He wanted to know what honourable gentlemen meant to do when they talked about the danger of this bill? Would any one say that it was possible for Ireland to remain in the state in which she was at this moment? No grants of landed proprietors, no loan of money, no artificial stimulants to create labour for Ireland, would be of any use whilst you had the law of real property in the state in which it was. If you meant sincerely to eradicate crime you must go a long way in altering the law of property in Ireland, and it was the bounden duty of the house to adopt such measures as would create a race of small proprietors in Ireland."

On the debate of the 21st, the Solicitor General, who has throughout laid down most powerfully the true principles which should regulate this measure, declaring in so many words that "land should be made a marketable commodity," said, "One of the great advantages of this bill was that its plain and simple machinery afforded the means of giving a short deed of conveyance; as the present large expense of conveyances prevented in that country the sale of small portions of land. To produce such an effect they must pass such a measure as the present, emancipating the land in the hands of the owner, for unless they made land marketable in Ireland, as it was not at present, every other measure they might attempt to pass for the relief of the country, would be found utterly ineffectual."

We might give other extracts from other speeches to the same effect, but these were the principles which it was universally admitted should guide the legislature, and all our readers will remember that almost in the same words, the same truths have been again and again enforced in the reports and proceedings of this Society. This, then, is the duty which it has successfully performed.

¹ See *anté*, p. 243.

ART. II.—*Now and Then.* By SAMUEL WARREN, F.R.S.
Blackwood.

IT is recorded of Dr. Johnson by his inimitable biographer, that on finding a little girl in company, he was for making much of her, and taking her on his knee asked her whether she had ever read Gulliver's Travels; but on her answering "No," he put her down forthwith, and would have nothing to say to her. This we must say is something of our own feeling for a lawyer who ventures to admit he has not read the popular novel of the day: In such case we are sure he is a poor creature, and will never rise to any eminence in his profession. Almost equally criminal in our eyes is he who attempts a miserable criticism on such a work; he evidently reads it with other eyes than were intended: he allows his wretched spirit of demurrer to whisper in his ear, and possibly that demon which lies within the folds of an abstract of title is summoned to his aid. He is not worthy of the real enjoyment which gives up for the time the whole inner man to the entire mastery of the writer who has in some genial moment unrolled the sweet page of fiction. To be a fitting novel reader a man must entirely surrender himself to the enchanter; his world is that which for the time is created around him; at such a moment the wife of his bosom must be hateful to him, more especially if she asks for the second volume: his smiling babe is horrid in his eyes if she comes to interrupt him, and, without finding it necessary to go the length of Lady Macbeth, he will "stop up the access and passage to remorse," if he be really a true lover of romance. He may retire to his study, or to a garret, if that is a safer retreat; he may there lay in store of fire and light, and possibly, to use the words of a familiar circuit story, "a live coal and more mixed liquor;" but the approach of mortal creature he cannot for his own or its safety allow. For the time he is hating and hateful. He lives among the creations which have been called up for him; he cries, laughs, expires with grief, is transported with joy, as it may be. This is the genuine feeling; and if our readers have never, in their life,

experienced it, we can only say, that they may be excellent persons, but that we feel the same pity for them that Dr. Johnson did for the little girl.

But then to excite this feeling *the work* must be a good one. Alas! we read; but how seldom do we get any thing of the right sort? We respect Mr. James; but with him we always find it more convenient to begin with the third volume, in order to get the sooner to the "charging part." Mr. Cooper has his merit, but his late novels should be referred to the master for superfluity.¹ Indeed three or four of them have been mere bills of revivor and supplement. And so we may say at present with most others. We think we see something better in a late writer of an epicene character, a certain Mr. or Miss Bell²; but he or she has begun by treading on dangerous ground. Bigamy is an indictable offence, and cannot be rendered excusable; and the wife in the garret leaves an exceedingly unpleasant impression on the mind, and, for our own parts, we could hardly return to the book after the disclosure. But we say this in all kindness, if possibly this may reach the author, or authoress, if it be so; for there is great power and much good feeling in the book, and we are sure that better things will follow.

But what of Mr. Warren? Why we think that his book is a genuine book, and it came at the right season. Some kind fairy laid it on our table on Christmas eve, and we then and there seized upon it, and no power could afterwards tear it from our grip. There were, we remember, two young ladies who had kindly come to spend the Christmas with us, — ladies of great beauty and merit, and we saw that the youngest had fixed her snaky eye upon the book: but no, we are kind and benevolent, and we could have willingly given her any thing in reason, to the extent of half our kingdom, that is half of the copyright of this Review. But as to letting her read this book before us, flatly we would not; so seizing it we bore it off to the innermost cave of our

¹ In one of them, a whole volume is consumed on the coast of England on an outward bound voyage.

² We are assured, on judicial authority, that the authoress in question is a Miss Edwards, and that she lately appeared as a witness at a Welsh assize town.

abode; and before the Blessed Day had dawned we were fairly master of the whole of this portly volume. Now we are not going to tell its story, or give the slightest analysis of its contents. We know that all our readers have read it; if not, they must forthwith do so; and we are sure they will agree with us that it is a genuine novel, in which each character stands well out in its proper place, making altogether a perfectly distinct and well-arranged group, moving about neither on stilts nor too quickly, but each acting its part naturally and gracefully, like real flesh and blood creatures.

But we have another reason for noticing this story. If we do not mistake it will make many feel an interest in that cause which, so far as this world is concerned, lies nearest to our heart. It is a fair exposure of some of the remaining faults in our criminal procedure, and a gentle satire on its former state. Sheridan laughed at Cumberland for attempting "to gibbet capital offences in five acts, and to pillory petty larceny in two."¹ But the incidents connected with crime have long been the staple of the novelist, and we would willingly see them made subservient to the great cause of the reform of the law, and Mr. Warren may really do good service if he will give us some of the results of his professional experience in this form. He can draw accurately, and at the same time light up the picture with the vividness of his imagination. The dull realities of professional life might be heavy work, and the blundering attempts to depict juridical realities made by the unlearned reader provoke only the smiles of the *cognoscenti*. But he who can truly draw and properly colour has an inexhaustible store of subjects in the court-house and circuit, to say nothing of the Old Bailey.

We propose, then, to take a scene from this work, as giving our readers some idea of what takes place after conviction, and as showing the necessity for some Criminal Court of Appeal. It may be necessary that this should be one of a series of reforms; but surely something should be done with respect to it.

¹ See "Critic," act i. sc. i. : "I suspect his idea is to dramatise the penal laws, and make the stage a court of ease to the Old Bailey."

It is sufficient for our purpose to say, that a prisoner has been convicted of murder who is innocent, but against whom the evidence weighs very strongly. The clergyman of his parish is satisfied of his innocence, and comes up to London to state his case. He first goes to the Home Secretary, who refers him to the Chief Justice who tried the prisoner.

" 'Tell his lordship, if you please,' said he, quietly, 'that I am the Rev. Mr. Hylton, the vicar of Milverstoke.'

" 'Oh! is it about the Milverstoke murder, Sir?' quoth the butler, with a good-natured air: 'Tis a very awful murder, folks say.'

" 'Take in my name, sir, instantly, to his lordship!' said Mr. Hylton, sternly.

" 'Bless us!' said the butler, half whistling, but went to the library, and, after a few minutes' absence, returned quite an altered man, bowing most obsequiously; and Mr. Hylton was immediately ushered into the presence of the Lord Chief Justice; a man considerably advanced in years, of benevolent countenance, care-worn and grave, a very great lawyer, of simple and pure character, and very unassuming manners. He sat beside a large fire, in dinner dress, but had been busily engaged reading when Mr. Hylton's name was announced: in short, his lordship was carefully looking over his notes of several capital cases, and, amongst others, of that which had brought Mr. Hylton up to town. The instant that his name was mentioned his lordship recollected the very striking scene which he had accidentally witnessed immediately after sentencing the Milverstoke murderer; and nothing could be more respectful or cordial than his reception of Mr. Hylton.

" 'I fear I can only too surely conjecture, reverend sir,' said his lordship, gravely, 'the object of your visit to London; it must be connected with that terrible case of the murder of Lord Alkmond, tried before me yesterday.'

" 'It is so, my lord, indeed,' replied Mr. Hylton, sighing. The Lord Chief Justice shook his head, shrugged his shoulders with dismal significance, but said nothing. 'I trust that I shall be able, my lord, notwithstanding those ominous gestures of your lordship's, to satisfy you that a case is made out for, at all events, some little postponement of the execution of the sentence, in order to afford time for inquiry. I say—for inquiry—for ini——'

" Mr. Hylton suddenly seemed unconscious of what he was saying; having become very faint, and sinking back in his chair; for

a moment overcome with exhaustion, want of food, and long-continued agitation and excitement. The Lord Chief Justice instantly ordered in a glass of wine, giving it him with his own hand, and using many kind expressions. Mr. Hylton soon recovered himself, offering apologies, but attributing the weakness frankly to the true cause.

“ ‘Ah! sir,’ said his lordship, kindly, ‘these are very agitating affairs, even to us judges, however long we may have been accustomed to this melancholy part of our duties; but let us go into dinner, Mr. Hylton.—Nay, I positively insist upon it—I am quite alone, with the exception of my wife, whom I have scarcely seen since my return from circuit, a few hours ago, or you and I would dine together alone. You cannot do justice to your case, whatever it may be—trust me—till you have recruited your physical energies; and we have both travelled far and fast since we met, and I, too, am somewhat exhausted.

“ ‘Mr. Hylton intimated that dining would be, in his own case, just then, an idle ceremony.

“ ‘ ‘Sir,’ interrupted the Lord Chief Justice, with an air of good-natured peremptoriness, ‘I will not speak a syllable to you on business, however pressing, till we have both enabled ourselves, by a meal, as brief and frugal as you please, to attend to it with revived and only befitting energy.’

“ ‘This proved irresistible, and Mr. Hylton presently found himself sitting at the plain and unostentatious dinner-table of the Lord Chief Justice and his lady. Not a syllable was spoken by either his lordship or Mr. Hylton concerning the subject, nor on any thing akin to it, which was to be so solemnly discussed by them after dinner; and before half an hour had elapsed from their sitting down, they both withdrew to the library.

“ ‘ ‘Now, Mr. Hylton,’ commenced his lordship, with a suddenly-resumed judicial air, ‘I have before me my notes of the trial of Ayliffe yesterday. What have you to say on the subject? Has any thing important come to light since the trial? For if not, I must tell you, at the outset, not to be too sanguine. A clearer case I think I have seldom, if, indeed, ever tried. I trust you have no fault to find with the way in which I put the case to the jury? Pray speak freely, reverend sir; we are all liable to error.’

“ ‘ ‘My lord, I frankly assure you that I can take no exception whatever to your lordship’s summing up: it was fearfully simple and cogent, but perfectly and absolutely fair.’

“ ‘ ‘Why, you see,’ said the Chief Justice thoughtfully, ‘the

man's own hands fastened the rope round his neck : he voluntarily took up a position from which the wit of man could not extricate him. Had he been acquitted on such a state of facts as went to the jury, trial would be a farce. He brings himself to the body instantly after the murder, and runs away bloody, and with a bloody weapon capable of committing the murder, as was sworn by the surgeon. Even if he thought he had struck the man whom, according to his own story, he meant to strike, what signifies it in point of law ? The person whom he so killed by mistake he murdered : God forbid, reverend sir, that there should be any doubt about that.'

" ' Oh no, my lord ! I do not presume to question the law which your lordship laid down ; I own it seems to be perfectly reasonable and just. But I venture to come now, my lord, at once to what I humbly but confidently submit will satisfy your lordship that this case cannot possibly rest where it does at present.'

" ' Well, let me hear,' said the Lord Chief Justice, disposing himself in an attitude of great attention ; but the tone of his voice seemed, to Mr. Hylton, to argue something like a foregone conclusion as to the futility of what was to be brought him.

" ' Permit me to ask your lordship, that I may not be over-estimating the value of what I am going to adduce before you, whether you did not deem of great importance the absence of all sound of footsteps in the wood on the night of the murder in any other direction than that in which the prisoner ran ?'

" ' Certainly, certainly ; surely I myself pressed the witnesses on that part of the case, and remarked on it to the jury.'

" ' You did, my lord ; and, indeed, the point is most important. If you recollect, Mr. Solicitor-General read a passage from Lord Coke, in which that very condition is relied on as an integral part of what he calls his violent presumption of guilt. Well, my lord,' said Mr. Hylton, evidently with no little excitement and expectation, taking out of his pocket-book the letter of Mrs. Merton, which, after explaining who the writer was, and how it was that her communication had not come to his hands till after the trial, put the letter into the Chief Justice's hands, and eyed him, as he perused it, with extreme anxiety, scrutinising every feature.

" ' The Chief Justice read it attentively, very attentively — even twice ; looking at the outside, the post-mark, and the superscription ; and all the while in perfect silence, and with a countenance from which it was quite impossible to collect what impression had

been produced on his mind. Then he quietly laid down the letter towards Mr. Hylton, whose face fell as he said,

“ ‘ Well, my lord, what think you? Have I over-rated the importance of this letter ? ’ ”

“ ‘ You have not had the experience that I have had, Mr. Hylton,’ said he, with a serious air; ‘ nor have you any idea of the cunning devices to which prisoners and their friends will have recourse, to mislead inquiry and divert suspicion. I have known of one or two, and heard of several instances very like the present.’ ”

“ ‘ Why surely, surely, my lord, you cannot have borne in mind who the writer is;—a lady, a friend of mine, wife of a clergyman, and she of a most exemplary character;—the idea, my lord, of *her*——’ ”

“ ‘ Oh, Mr. Hylton, you quite misapprehend me. Independently of even your own testimony, I think I know a little myself of this lady; she belongs to a noble family’—Mr. Hylton nodded—‘ and her husband is a distinguished divine, I believe. This good lady believes, doubtless, in the genuineness and authenticity of the letter she speaks of; but—he shook his head—that carries us a *very* little way on our journey indeed! I told you not to be sanguine, Mr. Hylton, as you must remember. Besides, where is the original? How could any judge safely act, in even the most trivial case, on the document now before us—not even a copy? And even the original would, in my opinion, carry us no further. Come, my dear sir,’ said he, very kindly, observing Mr. Hylton’s blank and crest-fallen look, ‘ can you yourself supply me with reasons against the validity of those with which I am forced to encounter your letter ? ’ ”

“ ‘ Yes, my lord. Remember, I pray you, that I am not asking for a pardon—not calling on you to assume the functions of a jury, but only to interpose a little time for inquiry before this poor wretch *goes hence, and is no more seen!* Suppose he be executed on Monday morning, and the same afternoon the writer of the letter in question arrives, and incontestably establishes the truth of what is contained in it? ’ ”

“ ‘ Why, suppose he did, Mr. Hylton! Apply an unbiassed mind to the case, as if you had yourself to administer justice. By the way, are you a magistrate?’ Mr. Hylton nodded. ‘ I am glad of it. Suppose the writer did actually see one, or two, or any number of men running along the shore, as represented; how are they to be connected with this bloody transaction in the wood? Is it not separated from the shore by the cliffs? ’ ”

“ ‘ Yes, my lord ; but by no means by lofty cliffs ; persons have been known to drop over without injury : there are no rocks beneath. And who knows but that those very persons may have done the deed ? ’ ”

“ The Lord Chief Justice shook his head ; but took up the letter and read it again, with, as Mr. Hylton sanguinely supposed, more thoughtfulness than his lordship wished to appear.

“ ‘ Pardon me, my lord,’ said Mr. Hylton, ‘ but there occurs to me another way of putting the case ; and while we discuss, how fast fly away this man’s precious moments ! ’ ”

“ ‘ I am perfectly and painfully aware of *that*, reverend sir,’ replied his lordship, looking pointedly at Mr. Hylton, who felt the delicate rebuke, and bowed.

“ ‘ I was going to say, my lord, suppose I had received this letter, or the one to which it refers, before the court opened yesterday, and the prisoner’s counsel had applied to your lordship to postpone the trial till the next assizes.’ ”

“ ‘ Sir, that is well worth considering. Undoubtedly you put your points very ably, Mr. Hylton.’ ”

“ Again the Chief Justice took up the letter. ‘ Is this in Mrs. Merton’s own handwriting ? ’ he inquired, apparently carelessly.

“ ‘ I will swear to it, my lord ; and, by the way, for aught I know, Mr. Merton may by this time have brought or forwarded the original letter to my house, and it may be there awaiting me at this moment.’ ”

“ ‘ Certainly, certainly ; that may be so ; ’ said the Chief Justice, musingly, but still discouragingly. ‘ Is this the only matter which you are desirous of bringing before me ? ’ he inquired.

“ ‘ Oh no, my lord ; I have three others.’ ”

“ ‘ I shall be very happy to hear them, sir. Pray proceed.’ ”

And thus does Mr. Hylton proceed. But we have given enough, we think, to show not only the manner of the writer, but how very unsatisfactory, after all, is the existing tribunal. Here we have an appeal to a man who could not fail to have a pre-existing opinion, who has to consider the case at the close of a harassing day, the prisoner having for his only advocate the chance assistance of a benevolent clergyman ! And yet all this is the true state of the case.

ART. III.—LAW LITERATURE.

AMONG the advantages which might be expected from the establishment of a law university, which we hope to see in our day, would be the more classical character of the acquirements of lawyers generally, and the creation of a body of law-professors whose labours would probably be devoted as much to law literature as to their more immediate duties of instruction. The habits of exact criticism, to which practical men can not give place in their pursuits, would be an ordinary duty, and the effects would first be exhibited in books of instruction, then in books of practice, and finally in the arguments of the counsel and the judgments of the courts.

The state of our law literature at this day makes us yearn for the coming of any event which will quicken the ambition and the efforts of legal authors. The majority of works, which issue from the press with pernicious abundance, disgrace alike the profession generally who write or who buy them, and the craft of booksellers by whose agency and by whose capital they are produced. It matters not whether they be books of instruction, or books of practice, or books of reference, treatises, essays, digests, reports, dictionaries, or indexes—they are generally wanting either in mastery of the subject or in mastery of the method. The student who desires to ground himself in the principles of his profession—the suitor who desires to obtain general information for his guidance—the solicitor who requires the details and routine of practice—the counsel who needs a ready reference to principles and analogous cases—the judge who wishes to check his own conclusions by the views of his predecessors, encounters a multiplicity of books and a wilderness of ideas dislocated and dispersed, with a waste of resource, that marks how great we are in the mechanical appliances of print and paper, and binding; but how insignificant in the science of

law, and in the art of law writing. Not that there is not much good matter, novel and valuable; but it is buried in detail, heaped together without form or order; and matters which they have in common are not only needlessly repeated, but repeated with needless differences. To expound the law in a masterly manner within a brief compass seems to be regarded as incompatible with reputation. The diamond is deemed valueless if it be not lost in the setting; the work must be as bulky and multifarious as an encyclopædia. We take the cause to be, that those whose function it is to cater for the wants of the legal public preach the doctrine that the book will not sell if it be not big. We doubt the truth of this; for it is our fate to sigh for little books, and we know the feeling to be common; but we do not doubt that the booksellers, whose profit is upon so much paper and print, find that it will not pay them so good a percentage; that it is more for their interest to sell much paper and print of little intrinsic value at a high relative price than less paper and print teeming with matter of higher value at a corresponding rate. But it is for the profession and the public to say whether they will have all the sources of law polluted and choked up by the crudities of whomsoever will choose to call himself author. For it must be remembered that the state of our law literature is the most prolific cause of "the glorious uncertainty of the law." Nobody can find what he wants. Every one finds it impossible to obtain from the books any thing, which he has occasion to seek, presented to him in a form which admits of a safe inference being readily deduced from it. The matter is so loaded with form and procedure, with references to cases and statutes, with learned arguments about disputed points, and so illogical and immethodical in the arrangements, that not only can no person discover how he is affected by the law, even in the commonest matters or on the commonest occasions, but the research generally terminates in wrong or puzzling conclusions.

We believe that if the skill and learning, the labour and the capital, which is bestowed in making bad books, were applied to the making of good ones, this article of manu-

facture would not be inferior to any other for which the genius of British industry is remarkable; and with a view to produce an improvement in this state of things, we put it to the profession to determine the point, whether it is better to have many works treating of the subject in every variety of way, each after its kind, and each a different kind, or many works all treating of the subject pretty nearly in the same way in every degree of completeness or incompleteness? Whether it would not be better that, instead of our law books being generally a number of encyclopædias of the subject, treating of the matter from the beginning of the world till now, and *de omnibus rebus*, without order and without logic, we should not treat the subject in distinct treatises of convenient size (capable, if it be so desired, of being bound together) — *historically*, exhibiting its progress to its present state; *logically*, in relation to the principles upon which it is founded, exhibiting the bearing of each principle upon the subject matters to which it is applicable, and the cases to which it may apply, with the conditions upon which the law becomes applicable; or *practically*, with reference to the course of proceeding and the forms by which the law is to be carried into effect; or *philosophically*, with relation to the principles of jurisprudence that ought to be applied to the subject, the improvement which should be made there, and the respective provinces of the legislature and the judicature; or *polemically*, with relation to matters which are in doubt or difference; or *philologically*, with reference to the nomenclature and terms in use, and the etymology of the terms; or in any other distinct mode of treatment?

How much better would it be that subjects should, under each phase, be treated connectedly and comprehensively, than in the shape of a multifarious farrago of heterogeneous stuff, — good enough probably in substance, but so interwoven and interlaced, that the reader has to go through the author's work, unravel the matter, think it out, and form conclusions for himself. If our writers would exhaust the subject in a single point of view, rigidly excluding whatever is impertinent, taking care not to repeat what has been stated elsewhere in an accessible form, and, indeed, to say nothing twice over,

our time, our purses, our credit, and our patience would all be saved, the law would become more certain, and lawyers would not be deemed a byeword and a curse among the people.

Our indignation, excited by the state of things, must not blind us to the causes; for through the investigation of them we must hope to find the remedy. The more immediate cause probably is the want of a regular teaching of the law as a science. In other countries, where there are professors of law, there are good law books; they are written by the professors who teach the subjects logically not practically; and traversing the same ground from year to year, gradually perfect their productions by the importation of fresh matter, and by repeated emendations.

In England our professors are few, and scarcely recognised; and of the profession generally it may be said that few have received a regular education. The greater number have studied, in the *chambers* of their tutors, cases as they arose, consulting the books for such information as they need at the moment.

Hence it is unnecessary to state that the professional men of this day are not the deeply read pedants of old time, but men of the world; and we fear, with few exceptions, they are not well grounded in legal principles, nor thoroughly masters of practice; and that, as a consequence of this as well as of the pressure of business, it is seldom that a matter is well argued. Nobody has time! The attorney has not time to write his brief; the counsel has not time to read it; and the judge has not time to hear the case, still less to consider it; and generally the judgments are hastily formed upon the specialties of the case,—a state of things which augments and perpetuates the confusion.

It is obvious that in proportion to the want of preparation and to the hurry of business it is important that what books it may be necessary to consult should be ready of access in all senses of the term; that they should be so written that the principles and scope of the work may be apparent; that illustrations of the bearings of the law should be distinguished from statements of general propositions.

But instead of being written with more care and ability, according to the exigency of our wants, they often appear to be a mere collation of marginal notes of cases in the books, and the loose random arguments of the writer, done by the piece at a contract price.

Now it is much to be regretted that the art of book-making is not studied to better effect;—an art which, in spite of the unmerited obloquy with which it is regarded, holds a high place in our esteem. Like eloquence it may be made useful for a good purpose as well as a bad one; and, if it be well used for a good purpose, has merits which we would fain see applied more generally in law literature. The remarks which we shall have to offer in disparagement apply to the meagre efforts of mere tyros and bunglers in the art, who may know their subject well enough, but know not how to set it off to advantage.

The ordinary recipe is — to a title-page add a preface, outline, table of cases, table of statutes, introduction, text, notes, precedents, collection of statutes, and index; and to these ingredients we have little exception to make. Our quarrel is with the manner of putting them together, which is a fraud upon the purchaser of the book, and a sin to the nation; for a bad book not simply encumbers the market, but often hinders the writing of a better.

We propose to offer a few remarks upon the nature and uses of the ingredients above mentioned, and to add some suggestions for their better application, in the hope that we may excite emulation, and eventually induce our law writers to establish a practical code of law that may supersede or lessen the necessity for a legislative one, which, if we may judge by the apathy and treachery of those upon whom the duty has hitherto devolved, it is folly to look for in our time.

First, of the *Title*. — The title is by no means an unimportant part of a book. If the title be expressive, and be truly applied, it is the book-handle,—that by which the public mind takes hold of the idea of the book. The title may help to keep the writer within bounds, as well as to apprise the reader of what he is to expect. Instead of this, like the title of novels, it is used to delude or beguile. Thus

many law books are entitled practical, upon the supposition that the *practical* cancels all defects of method or of principle. We would treat all such false pretences with the greatest severity, as mere mountebank attempts to palm a bad article upon an ignorant and gullible audience.

The *Preface* is often a mere means of swelling the bulk of the book—a fuller statement of the outline or table of contents. Its proper office is not, we conceive, to enumerate the contents of the work, or even explain them, but the manner of treatment; to indicate reasons for omitting what might have been expected, and also peculiarities; the occasion for the work; the purpose which it is or was intended to serve; the state of the subject; the contribution made to it;—not a criticism, indeed, but an exposition, averting misapprehensions into which critics are apt to fall, from not considering the position which the author has taken, or intended to take. It should, with the help of the outline, be an intelligent answer to the inquiry—What does the work contain?—what does it add of new facts, of new cases, of new propositions, of new illustration of old propositions, to our stock of knowledge on the subject?

The *Outline, or Table of Contents*, is often a mere hap-hazard statement of a mere hap-hazard composition, enumerating, in short phrases, the disorderly contents of the work. It affords opportunity for the logical writer to exhibit, in strict analysis, the method which he has adopted; and, by thus giving a clue to the labyrinth, enable the reader to seize the tenor and meaning of his writing as readily as such dry stuff will allow.

The outline should, with the printer's help, exhibit not only the whole scope of the work, but its subordinate, or, at least, its leading divisions. The professional reader is entitled to every means of discovering what the work professes to give.

This outline will vary according to the method of treatment which the author may think proper to adopt, whether it be historical or logical,—a directory of practice or an exposition of a moot point,—the report of a case or set of cases; but let the method be what it may, it is desirable that the author, availing himself of the best examples, and, if need

be, improving upon them by making his outline more comprehensive and complete, should aim at making a standard method which, from the general estimation of its excellence, subsequent writers may be disposed to adopt, — a rule to be regarded in all other branches of his undertaking with the same end in view. The best and most legitimate innovation, and that which the most conservative and the most reforming of writers is equally called upon to adopt in furtherance of their respective views, is the realising of the suggestions of elder practice in the best manner. The former will find that that which is, may be best preserved by giving to it a full development; while the latter may find that the purposes of his reforms will be more effectually accomplished by embodying them in well-approved forms, than by adopting new methods, which nobody will allow him to produce in any degree of perfection. We should caution the analyst to take care that things of the same kind are put together — that subordinate things have not equal rank with higher things — that the contents of a thing be not made of the same degree of importance as the whole of which they are parts — and that accessaries have not the place of principals. The observance of these rules, with proper distinctions of type, will make it impossible for an intelligent author to sin against logic in his text.

To many persons the utility of the *Table of Cases* is not very apparent. Its purpose is to assist persons who may have to consider what has been said in all sorts of books of the cases and their subjects; but it is only of half the value which it would be, if it were exhibited chronologically, so that the historical relation of one case to another might be indicated, — an important object in considering the bearing of the doctrines of one case upon others, and the considerations and reservations which the judges may have had in view. It would add much to their value, if the names of the judges or chief judge of the court at the time were also given; for it is the judge, and not the case, which is the authority; and it must be remembered that, from causes to which we have already adverted, the practitioners seldom refer to the authorities themselves. It is necessary, therefore, that they

should be brought home to the mind in the tables of reference.

We have sometimes thought that if much irrelevant matter now inserted in law books were rejected, it would be useful to prefix to the parts or chapters, or sections of a work, a chronological list of cases and of statutes which are therein referred to. They would be of immense service in chamber practice, and save the necessity of hunting up cases, or spare the risk of an off-hand opinion without looking at them.

The *Text*, or body of the book, is the *corpus delicti* of law writing. The elements of offence are too numerous to be recounted. Many of them will be indicated by the cautions which we have thought it our duty to give. The text ought to comprise two parts, interwoven with each other, but sufficiently distinct to admit of being separated. The former should consist of the statement of principles; the latter of the examples or statement of cases; and it would be desirable to eliminate all moot points, and the arguments *pro* and *con*, and place them in an appendix.

In some books the cases are referred to in the text; in others in the foot notes; in others at the end of the work. It may be questionable whether, if the cases were arranged chronologically, and numbered accordingly, the reference to the number might not be sufficient, serving at once to refer to the case, and to mark its position in the order of time.

In writing a law book, the same method and precision are necessary as in writing a law, yet without the restrictions which in a law forbid the exposition of points of doubt and difficulty, and of the history and the state of the matter. These matters, however, should be supplementary, and not form part of the text.

The principles or general rule should be first stated, and immediately afterwards the examples; the latter being put in separate paragraphs or sentences, and numbered for the sake of greater distinctness. The case should be stated as follows:—

- (1.) The matter of the case.
 - (2.) The name of the case and of the judge or legal authority.
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And in stating the case in detail it should be stated thus:—

1. The subject-matter.
2. The circumstances of the case.
3. The conditions.
4. The action.
5. The limitations.
6. The conditions subsequent or defeazant.

Or, in other words—(1.) the matter and the status quo; (2.) the event or action; and (3.) the effects or consequences.

The dicta, especially upon bye points, should be carefully abstracted; and the gossip style usually adopted—Lord Hardwicke said this, Lord Brougham said that, and so and so in his excellent work said the other, should be avoided; any bye mention of legal authorities, or praise or censure by the way, being relegated to the notes. A law writer should for the nonce regard himself as the expounder of the law, and speak, *ex cathedrâ*, as if no other judge ever existed before him, and the matter were to be determined by his sole authority; yet, in all this, he should have regard to case and authority, and not only be prepared to state them, but actually state them in some way that will not disturb the connection of the text.

Neither judge nor author will be competent to their task of expounders, if, while they are stating the law, they feel it necessary to refer to the sanction of authorities. Their minds should be imbued with the principles; and full of needful illustration, but of illustration almost fused into principle, and the mere special embodiment of the general proposition. Every judge or writer who has been canonised by the profession has distinguished himself by this eminent service.

In treating a book upon a special subject, the general law should not be treated of further than it may be necessary to explain the special subject. Many books are eked out to an immense bulk by neglecting this rule, to the effect of destroying the peculiar value of the work, forbidding the purchase by reason of its cost, and the perusal by reason of its bulk.

The text will of course be simple, according to the degree

in which it is relieved from all extraneous matter, and to the degree in which the arrangement is logical.

It is desirable that the matter should be properly distributed in chapters, sections, clauses, and paragraphs; and that, although the matter of a chapter or a section be limited, it should not be denied its proper division or place. It is of far more importance to mark the logical division than to avoid the appearance of pedantry, to which some are inclined to attribute this strictness of method. Besides in subsequent editions it will admit of the insertion of new matter, without disturbing the arrangement, and destroying the references.

As to the text generally we are disposed to urge the importance of paying close attention, not only to the order of the matter but to the structure of the sentences. Each sentence should be modelled strictly according to every other sentence of the same kind; and sentences of different kinds should differ only to the extent of the differences of matter. Euphony should be sacrificed to uniformity. In our law books, as at present written, scarcely two sentences together are written alike, or according to their proper nature. This is not a mere question of style; it is a question of substance. The law has to deal with positive things—with persons, times, places, acts, and the cases and conditions, and not with mere words and forms; and the words and forms should be made to realise, with Chinese exactness of imitation, the true representation of these things, so that the reader may at once detect differences.

The introduction and use of *Notes* is a matter of the first importance in law writing. It is not enough to state the law in general propositions. The British mind is not fond of what it calls abstract propositions. It requires that they should be embodied in practical illustrations. It must know, too, not only what the proposition contains but what it excludes; and it seldom feels safe, as to what is contained and as to what is excluded, till it be enunciated. A book which does not satisfy this want is said not to be practical, and it will not be bought. Now much of all this matter is impertinent. It is the office of the notes to deal with it. But

as this matter is very multifarious, and, like all impertinences will not submit to rules, the notes require some skill. Like parentheses, they should be of a bye nature; not indispensable to the meaning, but explanatory, and relating to matters which cannot be interwoven with the text without overlaying it.

Forms and Precedents have often been inserted in the lump, sometimes in the body of the book, and sometimes in the appendix. If appropriate and well digested they are of great value. They find their more appropriate place in the appendix.

The collection should be preceded by a table of contents; and each precedent should receive all the aid that can be derived from printing, which may be done partly by printing it in distinct paragraphs, and partly by prefixing an outline, and partly by directions and cautions, calculated at once to mark the differences of the precedents, and to facilitate their use and application.

The *Collection of Statutes* should be prefaced, not only by a tabular list exhibiting the statutes in chronological order, but with an analytical table of contents; and it would be desirable to add a short history of the statutes, showing in what circumstances each statute arose, and the effect which it had upon the previous statute law, and also upon the law generally. Instead of the mass of dead matter which, in the shape of the statutes relating to the subject, now encumbers law books, and plagiarises the statutes at large, we might expect a useful body of practical exposition, which would come in aid of the legislature and in relief of the courts; the pressure of current business scarcely ever permitting counsel, whose office it is to assist the judges, to compare statutes in *pari materia*, or even to collate the passages of the same act of Parliament. Upon what principles and method such an exposition should be constructed, so that it may rather lead the mind to look at the law in its terms, than rule it by forcing the impression which the writer has received, we have neither space nor time to consider on the present occasion.

The *Index* is sometimes an abstract of the contents of the work put alphabetically, almost as full in the expression as

the text itself; sometimes it is a mere alphabetical table of short references. In neither case does it fulfil the uses of an index. It ought to be analytical, and of the nature of a concordance, bringing together all the matter of the same nature. It should consist of many parts, a general one, alphabetical, referring, in the briefest manner, to the places where the subject may be found in the other parts; and it should contain one part relating to persons; another to times; another to localities; another to instruments or forms; another to procedure; another to acts or events, besides probably some others; and all should be exhibited analytically, so that the contents of different books, on the same subject, may be readily compared even by the busy practitioner.

The alphabetical system, except for purposes of the most general reference, has a scattering dislocating effect. Whatever method has prevailed in one's thoughts is violated; and to the labour of finding our matter in the heterogeneous mass, is superadded the labour of collating it, in order to enable us to arrive at fit conclusions. It is the office of the index-maker to bring us as nearly as possible to the last stage, without taking upon himself, by the adoption of one scheme of view to the exclusion of others, to force any set of conclusions upon our minds.

In this department of exertion, the aid of the skilful and tasteful printer is most useful and necessary. Whatever facility may be afforded by distinctions of type and methods of printing, it is a duty to take advantage of, in defiance of any objection on the score of novelty, of difficulty, of labour, or of expense. It will give value to the skill and learning of our best men, judges, and practitioners, by saving their time and labour. But to render the task effectual, it is necessary that the printer should work in conjunction with one skilled in logical distinctions, and that the same methods should always be employed on the same occasions. It may be doubted by some, whether typography affords a variety of form sufficiently various to mark the requisite distinctions of subject; but any doubt of this sort will be dissipated by the casual survey of the current literature during a very short period. The variety is almost infinite, and excites regret that

it is not employed to better uses than to emphasize the exaggerations of advertisers.

We have purposely avoided the invidious task of mentioning examples which have suggested our cautionary remarks. We reserve for future adventurers in this class of enterprise the severities which the desecration of the high art of book-making so richly deserves. On a future occasion we may indulge ourselves with the agreeable task of referring to those authors whose works afford examples of the better methods of writing, leaving to their own consciences to punish them for their delinquencies from which, and some grave ones, we fear that none are free. We could almost wish that we had a provisional government which should exercise the useful tyranny of decreeing, that none should be chancellor, judge, or other high authority, until he had indicated his superiority by the production of a work worthy of his profession and of the distinction which he seeks.

Sure we are that no one is fit to be a judge who cannot write a proper book. The same talents (with the addition of some others,) are required for the judge as for the writer,—the power to discriminate between what is relevant and what is not,—to marshal the facts and circumstances of the case,—to note the distinctions, and to state, in clear and un-mistakeable terms, the conclusions. We are not so unjust as to expect such things from men who have long since abandoned habits of composition; but it would be wiser to exact hereafter, from the young men of our day and our future functionaries, a test which would at once qualify them, and enrich our law.

We fear that, although our suggestions may be adopted by individual authors, they will not be generally adopted until the *Law Book Publishers* act more in unison. Instead of the petty rivalry that now obtains, we think that combined action would at once better meet the commercial views of the publisher, and the interests of the public. Competition is out of place in so limited a range of dealing, and is not productive of any good effect. We should desire to see an association for promoting the improvement of law literature, making it at once better and cheaper; and we think it might

be accomplished thus: — 1. Let the society consist of members of all branches of the profession; 2. Let the object be like that of a railway, simply to provide a facility which all comers may use upon performing the conditions of payment; 3. Let the society contract with printers, paper-makers, publishers, to bring out works on stated terms; 4. Let any person, upon indemnifying the proprietary, be entitled to bring out a work upon these terms with the addition of 5 per cent. to the proprietary for their care and trouble in the matter; 5. Let them be entitled to 5 per cent. on the sales, and to a small charge sufficient to indemnify them for the warehouse-room of unsold copies; 6. Let the author have a pass-book, debiting him with the charge that he has incurred, and crediting him from time to time with the copies sold; 7. Let the advertising of works be conducted in a systematic manner, bringing under the notice of different classes of readers the works which they may prefer, and relieving the individual work of a portion of the charge resulting from the advertisement duty, and from the necessity of saying much about it, that the advertisement may not be so small as not to attract attention.

All the advantages which booksellers can give would be derived from this method, and it would not be unfavourable to them. They would become undertakers of works as they are now, either on their own account, or by advancing capital and sharing the profits with the author; but in the latter case the author would not be wholly in the hands of his bookseller: a third party would protect the interests of both.

The society might not only engage printers and other mechanical aids of that kind, but index-makers, who would relieve the authors of that most distressing part of their labours.

It might and should form part of the programme or scheme of the society, that works should be brought out in the best manner, partly that they might outrun all competitors, and partly that they might vindicate the character of the profession.

Nothing would be more certain than a property of this kind. By means of supplements systematically edited, the

value of the editions might be preserved till they had run out; and when new editions should be required, they might be forthwith issued with all the improvements that should have been so gradually accumulated.

That part of price (a very considerable part) which is imposed in respect of risk, might be much diminished, or divided between the public, the author, and the publisher.

Authors might make a certain property of their works with equal advantage to themselves and the public.

In making these suggestions it is with no spirit of hostility to the law booksellers. We have no doubt that they do not receive more than a remunerative return for their labour, capital, and risk; but we conceive that by different arrangements, in which they might take their full share, works might be brought out of a better kind, more fully answering the wants of the profession and the public, and yielding a more certain, if not a fuller, remuneration to the author and the publisher. It would obviously be out of place to give here more than a sketch.

Now that all the world admits the idea of reform, and is energetically acting upon it, it is desirable for existing interests not to stand with dogged pertinacity upon the ancient ways, but to inquire what it is that the importuners of change urge in uncouth phrase; it may be that they know not what they want, or how that which they do want is to be accomplished. Let us, the practical men, divine their purpose, and by our better skill realise the means. This is the language, and this the conduct, which all craftsmen of high and low degree should hold; and in the humble hope that we may assist the craftsmen of our order we have ventured to throw out the above suggestions. It is no longer of any use to cast imputations upon one another; all are conservatives, all are reformers, and the only practical course is to come to an understanding of the actual state of things, of our mutual wants and wishes, and the aptest means of realising them with the utmost possible advantage to each and to all. We are of opinion that a sensible, quiet, yet effectual, way of dealing with law reform

would be by bringing about very large improvements in law literature.

The Government and the Legislature might do much by establishing the office of Minister of Justice, and aiding in the establishment of a Law University; but on such a matter as Law, so extensive in its range, and so complicated, they cannot cope with any chance of immediate success. Topics of a dry scientific nature win little interest in Parliament, afford no opportunity for flights of eloquence, and, indeed, give bare occasion for party wrangle and throwing the lie in the teeth of contending statesmen. It is not the sort of thing for parliamentary warfare. The proper vocation of Parliament is not to make laws in detail. It has ever failed in that department. Its function is to discuss principles, to act the part of the Foolometer of the nation, to give vent to its prejudice as well as its wisdom, that the people may be enabled to grow disgusted with their vulgar fallacies and silently abandon them, leaving the better part gradually to take the higher place, and become the Common Place of the nation. This process is by far too tedious; and but for our much abused judges, who take advantage of this Common Place as part of the common law of the country, we should never have reached such decent perfection in our law as we have. It is for the authorship of the law, which, in modern times, has been strangely inefficient, to record in apter manner the work of the judges, and by thus insensibly aiding both the Legislature and the judicature, to raise the character of the profession, and rescue the Law of England from the imputations to which it is now justly liable.

ART. IV. — ON PRIZE AND BOOTY OF WAR.

[A peace of upwards of thirty years' duration having diverted general attention from some of those legal topics which are of peculiar importance and interest in time of war, the present unsettled state of Europe seems to afford sufficient grounds for now bringing under notice the leading rules and principles of law, with reference to the subject of the following article.]

PRIZE, in its general acceptation, embraces every description of property captured in the course of hostilities against the enemy. But prize, in the more limited legal definition of the term, properly means a capture effected by a *naval* force; property taken on shore by an army, or other land force, being not strictly prize, but *booty* of war.¹ That all prize is clearly and distinctly the property of the Crown is (says Lord Chancellor Brougham) "a principle not to be disputed." It is equally incontrovertible (says his lordship), that the Crown possesses this property absolutely and wholly without controul; that it may deal with it entirely at its pleasure; may keep it for its own use; may abandon or restore it to the enemy; or, finally, may distribute it in whole or in part among the persons instrumental in its capture; making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear that the title of a party claiming prize must needs, in all cases, be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject.² The foregoing observations were made in an important case relative to the Deccan prize money³, and had immediate reference to army-prize. But the same doctrine extends, also, to captures made by the navy. "Prize (says Lord Stowell) is altogether a creature of the Crown. No man has, nor can have, any interest but what he takes as the mere gift of the Crown; beyond the extent of that gift

¹ 2 Dodson's Admiralty Reports, 444.

² 2 Russell & Mylne's Reports, 54.

³ Alexander v. Duke of Wellington, 2 Russell & Mylne's Reports, 54.

he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace."¹

But the original right of the Crown to the absolute disposal of all maritime prize has been modified and curtailed by circumstances, which require a brief explanation. The Sovereign of England holds the office of Lord High Admiral, but in a capacity distinct from the regal character²; so that when there is no Lord High Admiral appointed by the Crown, the office resides in the person of the sovereign, and thus continues to have an uninterrupted legal existence. For the maintenance of this high office an ancient royal grant was made of certain kinds of maritime prize, which have thus been wholly divested from the Crown, and permanently attached as perquisites to the office of Lord High Admiral.³ These perquisites are called *droits* of the Admiralty; and the grant alluded to is recognised by an order of council of King Charles II.⁴, which thus defines the rights of the Lord High Admiral: —

" 1. That all ships and goods belonging to enemies *coming* into any port, creek, or road of this His Majesty's kingdom of England or of Ireland, by stress of weather, or other accident, or mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral.

" 2. That all enemy's ships and goods casually met at sea, and seized by any vessel not commissioned, do belong to the Lord High Admiral.

" 3. That salvage belongs to the Lord High Admiral for all ships rescued.

" 4. That all ships forsaken by the company belonging to them are the Lord High Admiral's, unless a ship commissioned have given occasion to such dereliction, and the ship so left be seized

¹ The *Elsebe*, 5 Robinson's Admiralty Reports, 173. ; *Thurgar v. Morley*, 3 Merivale's Reports, 20.

² Robinson's Admiralty Reports, 81.

³ 2 Ibid. 218, 219.

⁴ A.D. 1665-6.

by such ship pursuing, or by some other ship commissioned then in the same company, and in pursuit of the enemy: and the like is to be understood of any goods thrown out of any ship pursued."

Ports in the British East Indies are also within the terms of the Lord High Admiral's grant, although those dependencies did not at that time belong to England. Such, at least, appears to have been the opinion of Lord Stowell, although his lordship did not expressly decide the point.¹ But foreign ports are not within the Lord High Admiral's grant; and, therefore, that officer has no interest in any naval capture made in ports lying beyond the British dominions.² Such captures continue vested in the Crown, as the fountain of all prize.

During hostilities with foreign countries, the droits of the Admiralty, thus conferred and recognised, are strictly enforced by the Prize Court of Admiralty; although, during the long wars which terminated with the peace of 1815, the droits in question were generally conferred on the captors as a mark of bounty and favour, after first asserting and establishing the rights of the Lord High Admiral against the captors. Lord Stowell says, with reference to the first clause of the order in council — "that when vessels come in, not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of *war*, and are seized in port, they belong to the Lord High Admiral: but when the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crews, or from being forced or driven in by the *King's ships*, they belong to the Crown."³ The Lord High Admiral, however, has no prize interest in vessels coming into port *before* the breaking out of hostilities; such vessels when seized or detained at the commencement of war, being prize to the Crown, and not to the Lord High Admiral. A seizure or detention of this nature is termed an embargo.⁴

The grant to the Lord High Admiral was made at a time

¹ 6 Robinson's Admiralty Reports, 300.

² 6 Robinson's Admiralty Reports, 298.

³ 2 Ibid. 219.

⁴ 2 Ibid. 219.

when that office was on a footing which the present state of society and modern policy would scarcely suffer to exist. It is an establishment of ancient times, but little adapted to reasons of modern convenience: and if such an office were now to be instituted, some other mode of providing for its support than that of perquisites, so uncertain and fluctuating in their nature and amount, would probably be contrived. In fact, the Lords Commissioners, who execute the office, are always paid by regular salaries, like other public functionaries; and by recent Acts of Parliament, 1 W. 4. c. 25. s. 2. and 1 Vict. c. 2. s. 2., the droits of the Admiralty are, with other hereditary revenues of the Crown, directed to be carried over to the credit of the Consolidated Fund, while certain fixed revenues in lieu thereof are provided for the Crown; but the Acts reserve power to the Crown to grant the droits as special rewards to captors and others.

Before the sixth year of the reign of Queen Anne, there were no laws made for the benefit of either service, on the subject of prize; and all maritime prize which had not passed to the Lord High Admiral, by the grant above mentioned, belonged unreservedly to the Crown. But in that year the legislature thought proper, for the encouragement of the navy, to enable the Crown to confer upon the captors the benefit of all maritime prize then remaining at the disposal of the Crown; and for that purpose two Acts (6 Anne, cc. 13. 37.), commonly called *The Cruisers' Acts*, were passed; since which time, upon the commencement of every important war, in which the services of the navy are required, it has been customary to pass prize Acts, bestowing all maritime captures upon the takers or captors, to be distributed among them as prize in such shares and according to such rules or regulations as the Crown should direct by proclamation. But the Crown is under no obligation to issue such a proclamation, although the practice of issuing it on the commencement of every war has been so constant in later times as to authorise the expectation of its continuance. It is still, however, to be considered as the occasional act of the Crown's bounty, by which not the right, but the mere beneficial interest of prize, is conveyed for a time: but, nevertheless,

to return to the Crown, and there to remain till again conveyed by a fresh act of royal liberality.¹ It is to be noticed, therefore, as a legal distinction, that the grant to the Lord High Admiral is an absolute and perpetual alienation by the Crown of its interest in prize to the extent of the grant; and nothing short of an Act of parliament can restore to the Crown its original rights in the droits of the Admiralty. But the grant contained in the prize Acts, and the royal proclamation operates as a mere temporary transfer of a portion of the remaining rights of the Crown in respect of prize, and may be revoked or resumed at pleasure.²

It is the common practice of European states, in every war, to issue proclamations and edicts on the subject of prize; and till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of the prize Acts.³ These Acts, however, have all expired with the wars by which they were occasioned; but the Crown still issues, from time to time, during peace, a proclamation regulating the distribution of naval prize-money among the officers of the fleet, although slavers and piratical vessels, with occasional seizures for breach of the trade and navigation laws, are the only subjects to which the proclamations can apply during the cessation of foreign hostilities.

For the encouragement and reward of distinguished services on the part of the army, it is also usual for the Crown, upon the capture of large booty by a land force, to issue on such occasions a special proclamation, bestowing upon the successful troops the fruits of their own valour. Such occasions, however, being comparatively rare, there is no need of any standing proclamation to regulate the shares of the officers and men, and the distribution is subject to the discretion of the Crown in each particular case. But with the navy a standing law is essential; the capture of prizes being in that service an event of daily occurrence in time of war; and

¹ Per Lord Stowell, 6 Robinson's Admiralty Reports, 299.

² 6 Robinson's Admiralty Reports, 298, 299.

³ 1 Robinson's Admiralty Reports, 62.

captures and seizures of piratical vessels and slavers being also very frequent in time of peace.

The last proclamation relative to naval prize was issued in the year 1846, and is in the following terms :—

“ VICTORIA, R.

“ Whereas by our order in Council of this day's date we were graciously pleased, for the reasons therein contained, to annul the Royal proclamation of his late Majesty King William IV., of the 3d day of February, 1836, directing that distribution should be made of the net proceeds of prizes captured from the enemy, of captures and seizures under the several acts passed relating to the revenues of customs, and to trade and navigation, for the abolition of the slave trade, and for the capture and destruction of piratical vessels, and of the rewards conferred for the same [as well as of awards and allowances of salvage granted to the officers and men of ships and vessels of war when not otherwise specially appointed by the terms of the respective awards and allowances¹] according to the scheme therein set forth; and it is expedient that provision should be made by us for the future distribution of such proceeds or rewards; we do make known to all our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice and consent of our Privy Council, that our Royal will and pleasure is, and we do hereby direct, that the distribution of such proceeds and rewards shall be made in the following manner, viz. :—

“ That flag officers or officer, commodores of the first class, and captains of the fleet, shall have one-sixteenth of the net proceeds arising from prizes captured from the enemy, and from all other captures, seizures, head-moneys, grants and bounties as aforesaid, made by the ships and vessels under his or their command, save and except in the cases hereinafter submitted.

“ That when two flag officers shall be serving together, the chief shall have two thirds of the said one-sixteenth, and the other officer shall have the remaining third part.

“ That when there be more than two flag officers, the chief shall receive one half of the said one-sixteenth, and the remaining half shall be divided equally amongst the junior flag-officers, commodores of the first class, and captains of the fleet.

“ That no flag-officer, or commodore of the first class, or captain

¹ The words between brackets were added by a supplementary proclamation of 6th July, 1846.

of the fleet, not actually present at the capture or destruction of any piratical vessel or privateers belonging to the enemy, shall be entitled to share in the distribution of any head-money or bounty granted in respect of the crews of such piratical ships, vessels, or boats.

“ That no flag officer as aforesaid shall share in any remuneration or reward conferred or awarded as salvage, unless he shall have been actually on board the ship or vessel to which the award shall be made, or have personally aided or assisted in the transaction at the time the service was rendered.

“ That no flag officer commanding in the ports of the united kingdom shall share in the proceeds of prizes captured from the enemy, nor in other captures or seizures as aforesaid, made by ships or vessels which may sail from such ports by order of the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral, nor in the rewards, &c. conferred for the same.

“ That when ships or vessels under the command of several flag officers which belong to several stations shall happen to be joint captors, each flag officer under whose orders each ship or vessel may be, shall receive a portion of the flag share of one-sixteenth of the net proceeds in proportion to the number of officers and men present under the command of each such flag officer ; and the same regulation as to the apportionment of the flag share is to be observed when ships or vessels under orders from the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral, shall be joint captors with ships or vessels under a flag or flags.

“ And we do hereby further direct, that the following regulations be observed in respect to the distribution of the remaining portion of the net proceeds of prizes, captures, seizures, and rewards before mentioned (after the deduction of the flag share of one-sixteenth), or of the whole amount of such net proceeds in the cases hereinbefore provided, where no flag officer shall be entitled to share : —

“ First, that the officers and men composing the complements of our ships and vessels be distributed into thirteen classes, and that each officer, and man, and boy, who shall have been actually on board at the time of any such capture, seizure, &c., as aforesaid, shall receive such number or portion of shares as are expressed to each class respectively in the following table : —

“ First Class. — Commodores of the second class, captains, field

officers of marines or land forces above the rank of major, when doing duty as field officers above the rank of major, 100 shares.

"Second Class.—¹ Commanders, medical inspectors of hospitals and fleets, field officers of marines or land forces of the rank of major, when doing duty as such, 50 shares.

"Third Class.—Secretaries to flag officers commanding-in-chief, deputy medical inspectors of hospitals and fleets, sea-lieutenants², masters², captains of marines, or of marine artillery, or of land forces, when doing duty as such, whether having higher brevet rank or not, 10 shares each.

"Fourth Class.—Chaplains, secretaries to junior flag officers and commodores of the first class, surgeons, paymasters and pursers, naval instructors, mates, lieutenants of marines, of marine artillery, or of land forces, when doing duty as such, second masters, assistant-surgeons, five shares each.

"Fifth Class.—Gunners, boatswains, carpenters, first engineers, clerks in charge, clerks (passed), four and a half shares each.

"Sixth Class.—Midshipmen, masters' assistants, second and third class engineers, clerks, naval cadets, clerks' assistant, three shares each.

"Seventh Class.—Ship's cooks, admiral's coxswains, leading stokers, masters-at-arms, seamen's schoolmaster, sailmakers, ropemakers, gunners' mates, boatswains' mates, carpenters' mates, caulkers, blacksmiths, sergeants of marines, sergeants of marine artillery, sergeants of land forces when doing duty as such, two and a half shares each.

"Eighth Class.—Ship's corporals, captain's coxswains, quartermasters, captains of the fore-castle, captains of the main-top, captains of the fore-top, captains of the hold, coxswains of the launch, corporals of marines, and of land forces when doing duty as such, corporals and bombardiers of marine artillery, head kroomen, pilots, two shares each.

"Ninth Class.—Sailmakers' mates, coopers, armourers, caulkers' mates, captains of the mast, captains of the after-guard, captains of the mizen-top, yeoman of signals, coxswain of pinnace, second head krooman, paymaster, and purser's steward, one and a half shares each.

"Tenth Class.—Able seamen, musicians, stokers, and coal-

¹ But when a commander is not in company with a captain he is to receive 75 shares.

² But lieutenants or masters in command of vessels of war, and masters of the fleet, are to receive 20 shares each instead of 10.

trimmers, carpenters' crew, sailmakers' crew, coopers' crew, painters, yeoman of storerooms, flag officer's stewards, flag officer's cooks, flag officer's domestics, captain's steward, captain's cook, subordinate officer's steward, subordinate officer's cook, sick berth attendant, privates and fifers of marines and land forces when doing duty as such, gunners of marine artillery, ordinary seamen, one share each.

" Eleventh Class.—Paymaster and purser's steward's mates, cook's mates, barbers, landsmen, kroomen, three-fourths of a share each.

" Twelfth Class.—Boys of first class, half a share each.

" Thirteenth Class.—Boys of second class, three-eighths of a share each.

" Seamen gunners to share in all captures, rewards, &c., as aforesaid, in the class immediately above that of the class in which their rating is mentioned.

" That in all cases in which supernumeraries, whether officers or men, shall be ordered to do duty on board any of our ships by the Lord High Admiral, or by our commissioners for executing the office of Lord High Admiral, or by other proper authority (the orders of the captain or commander, if no senior be present, to be deemed sufficient authority), they shall share according to the class of the ranks or ratings which they hold in the service, if not ordered to do duty in a higher capacity. All persons borne on board our ships merely as passengers, whether officers or others, and who may be present and not decline to render general assistance in any action that may occur in making any capture or seizure, shall be entitled to share in the eleventh class if above the age of 20, and in the thirteenth if below that age.

" And that in the event of any difficulty arising in respect to the regulations hereby proposed, or any case should occur not herein provided for, or not sufficiently provided for, we are pleased to authorize the Lord High Admiral, or our Commissioners for executing the office of Lord High Admiral for the time being, to issue such directions thereupon as may appear just and expedient; and that such directions shall be considered final, and have the same force and effect as if specially provided for in our Royal proclamation.

" Provided always, that the distribution herein-before proposed to be made, or directed to be made, shall not be construed to affect any captures, seizures, &c., made within three calendar months from the day of our Royal proclamation, nor any captures, seizures,

&c., which shall be made after that day, and which shall be condemned or adjudged in any of our Courts of Vice-Admiralty, or any Court of Mixed Commission, before notice of our Royal proclamation shall have been received by the Vice-Admiralty Court, or Court of Mixed Commission, in which such condemnation or adjudication shall pass; and we do hereby further direct, that the proceeds of all such captures, seizures, &c., made within three months from the day of the date of this our Royal proclamation, or which shall be made after the date of this our Royal proclamation, and which shall be condemned or adjudged in any of our Courts of Vice-Admiralty, or any Court of Mixed Commission, antecedent to the notice of this our Royal proclamation having been received in such courts, together with all rewards aforesaid, shall continue to be distributed in the proportions and manner directed in and by his said late Majesty's said Royal proclamation, dated the 3d day of February, 1836.

“ Given at our Court, at Buckingham Palace, this 19th day of May, in the year of our Lord 1846, and in the ninth year of our reign.

“ GOD SAVE THE QUEEN.”

At the commencement of hostilities with foreign powers, an Order in Council is usually published referring to the causes of the war, and ordering that general reprisals be made against the enemy's ships, goods, and subjects, except vessels to which a licence from the Crown has been granted: so that not only the royal navy, but all other ships and vessels, commissioned by letters of marque or otherwise by the Admiralty, may lawfully seize all ships, vessels, and goods of the enemy, and bring the same to judgment in any Court of Admiralty in the British dominions. The right, however, thus granted to captors to seize all ships of the enemy, does not bar the Crown from any further exercise of its power with respect to seizure; for the Crown can still grant exemptions or protections as it sees fit. The Crown, which declares general hostilities, can limit their operation; it can except individuals; it can grant particular passes; and exempt particular classes of the enemy's ships, notwithstanding the right thus given to seize all ships.¹ And

¹ The *Elsæbe*, 5 Robinson's Admiralty Reports, 173.

even after the capture of prizes, and notwithstanding the prize Acts and the royal proclamation, and the rights conferred upon the fleet, the supreme right of the Crown to dispose of prizes in such manner as may appear most conducive to the public interests or the national policy, remains untouched: and in the case of the *Elsebe*¹, a Swedish ship, Lord Stowell decided that up to the period of final condemnation by the Court of Admiralty, the Crown can, by virtue of its prerogative, restore a prize to the enemy from whom it has been captured, and may take this step without the consent of the captors, and without even consulting them in any way whatever. For "the captors (said his lordship on another occasion) bring in their prizes subject in all cases to such interposition of the Crown; but such interposition is, and ought to be, of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country."²

The words of the proclamation, as Lord Stowell once observed, are the title deeds of flag officers³, and no naval officer can by law claim an interest in prize, unless it falls clearly within the provisions of the proclamation in force for the time being. But no capture is good prize to the captors unless it has been taken according to the laws of war, of which the Court of Admiralty is the sole judge; and therefore naval officers can acquire no perfect or absolute right of property in a prize, until it has been brought into a British port for adjudication, and there condemned by a Court of Admiralty; although as soon as condemnation is pronounced, the prize is considered the property of the captors from the time of the capture.⁴ In like manner, if a ship taken by a privateer be not brought into a British port, the captors acquire no property in the prize; and a sale of the captured vessel under such circumstances confers no property on the purchaser.⁵

¹ 5 Robinson's Admiralty Reports, 173.

² 1 Edwards's Admiralty Reports, 378.

³ 6 East's Reports, 235

⁴ 15 Vesey, Jun. Reports, 139.

⁵ 15 Viner's Abridgement, 51.

Prize or no prize, that is to say, the general question whether certain ships or goods taken at sea are become the property of the captors, is a matter not triable in a court of law, but is altogether appropriated to the Court of Admiralty, under its special jurisdiction as a Prize Court in time of war; and everything consequent upon naval captures is vested in the same court.¹ A late statute (3 & 4 Vict. c. 65. s. 22.) also gives jurisdiction to the Court of Admiralty in such matters relating to booty of war and the distribution thereof, as shall be referred by the Crown to the court, which is to proceed therein as in cases of naval prize. But when there has been an adjudication of prize by the Court of Admiralty, the rights derived from the prize Acts and the royal proclamations relative to captures, are cognisable like other rights, by the ordinary tribunals of the realm.³ It is to be noticed, however, that the Court of Prizes in the Admiralty is a different jurisdiction from the ordinary Court of Admiralty, which exists and exercises its powers both during peace and war; whereas the Prize Court exists only by a special commission issued on the declaration of hostilities, and its jurisdiction extends to Ireland and Scotland; the Admiralty Courts of those countries never having had a prize commission sent to them. Previous to the Act 41 Geo. 3. c. 99., the Vice-Admiralty Courts in the West Indies had only a local jurisdiction in matters of prize, confined to the adjudication of property brought within their respective limits.⁴ But by that Act jurisdiction was granted to those courts over all prizes carried into any British colony, and over all persons concerned therein, in the same manner as if brought into any port of the island or colony where such courts are held.

The duty of bringing in prizes for the purpose of formal adjudication and condemnation by a Court of Admiralty, is imposed on captors, in order to prevent them from making indiscriminate seizures without strict legal right, and also to prevent the right of seizure from degenerating into piratical

¹ *Brown v. Franklyn*, Carthew's Reports, 474. 476.

² *Lindo v. Rodney*, 2 Douglas' Reports, 613. n.

³ 1 Henry Blackstone's Reports, 515.

⁴ 3 Robinson's Admiralty Reports, 58.

rapine.¹ This rule serves also to correct the mistakes which may be committed by captors in the eager pursuit of gain, and by which great injustice might be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. But the rule in question is not wholly inflexible, and necessity requires that occasional exceptions should be made to it. An exception of this kind occurred in the case of the *Felicity*², a valuable American prize taken by H. M. S. *Endymion*, Captain Hope, in 1814. At the time of the capture the *Felicity* was in a most disabled state, through stress of weather and other accidents, and could not have been carried to a British port without a considerable reinforcement from the crew of the *Endymion*. It happened, however, that at this very time the *Endymion* was cruising off the coast of America by order of Admiral Warren, for the express purpose of encountering the American ship of war *President*, which was expected immediately to put to sea: and no other ship on the station, of competent force for that service, could be spared by the admiral. Under these circumstances Captain Hope could not send his prize to any British port for adjudication without at the same time reducing his own force; and he could not reduce his force without sacrificing the immediate and important service on which he was detached. When the case came before the Court of Admiralty, Lord Stowell thus remarked upon the situation of the captors with reference to their prize: "Under this collision of duties nothing was left but to destroy her; for they could not, consistently with their general duty to their own country, or, indeed, its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. Where *doubtful* whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the

¹ 5 Robinson's Admiralty Reports, 173.

² 2 Do:son's Admiralty Reports, 381.

captor's own state: to the neutral it can only be justified, under any such circumstances, by a full restitution in value."¹

Cruisers making captures are also directed by the general instructions of the Admiralty to bring their prizes to some *convenient port*. This is a discretion to be judiciously exercised: for with respect to neutral ships taken on the coast of America, it would be cause of infinite vexation if they were to be dragged across the Atlantic for adjudication, when this country has established courts in different islands in the West Indies, in order to provide for claimants in that part of the world the administration of justice at their own doors, and to prevent their commerce, as much as possible, from suffering interruption by the exercise of belligerent rights, on the part of this country, in those seas.²

Where a squadron or other associated ships are jointly concerned in effecting a capture, it is the practice of the Prize Courts to hold the joint captors entitled to share according to their respective forces contributing to the capture; and where efficient services have been rendered, on such occasions, by non-commissioned vessels, their proportion so calculated is condemned as a *droit* of the Admiralty. No greater proportion, even in cases of the highest individual merit, has ever been allowed than according to the amount of force present, and so contributing to the capture. That has been the invariable rule of practice, and is agreeable to the principles of natural equity and justice.³

We have seen by the Order of Council of Charles II.⁴, that all non-commissioned captures belong to the Lord High Admiral, and are known as *droits* of the Admiralty. But to render a capture a non-commissioned one, it is not necessary that there should be a total want of all commission whatever: for a regular force in the pay of the Crown may yet make a capture of ships under such circumstances as to do away the character of prize, and give the captors no

¹ The *Felicity*, 2 Dodson's Admiralty Reports.

² 5 Robinson's Admiralty reports, 385.

³ 2 Haggard's Admiralty Reports, 320.

⁴ *Supra*, p. 282.

benefit of the royal proclamation. A land force, for instance, is not commissioned to engage in naval operations; and, therefore, a capture at sea made by a force upon land is considered generally as a non-commissioned capture. "Thus (says Lord Stowell), if a ship of the enemy were compelled to strike, by a firing from the Castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit* of Admiralty, and the garrison must be content to take a reward from the bounty of the Admiralty, and not a prize interest under the King's proclamation. All title to sea-prize must be derived from commissions under the Admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take upon that element for their own benefit."¹ On the other hand, a naval officer detached by his superior officer to take the command of a private ship on a particular service, and making a capture with the force thus placed under his orders, cannot support any claim to such capture as good prize either for himself or others; for the force employed to effect the capture no more belongs to the navy than Dover Castle or any other land fortress does: and the capture being thus wholly non-commissioned, it becomes a *droit* of the Admiralty, and does not fall within the prize proclamation.² Where, however, a non-commissioned ship is the principal captor of a prize in which other ships are held entitled to share, that portion only which falls to the non-commissioned vessel becomes a *droit* of Admiralty, in conformity to the rule observed when a non-commissioned ship is admitted to share in a prize taken by a commissioned ship.³ These distinctions between the various kinds of captures may obviously be of great importance, as regards the prize interests of officers in both services: for though it has been the liberal practice of past times to grant the benefit of non-commissioned prizes to the captors, the benefit so

¹ 1 Robinson's Admiralty Reports, 235.

² The *Melomane*, 5 Robinson's Admiralty Reports, 41.

³ La *Virginie*, *Ibid.* 124.

taken is a matter of pure bounty and favour, and possesses no colour of right, as in cases of regular prize falling within the Prize Acts and the royal proclamation.

It remains to mention maritime captures made by a mixed or conjunct naval and military force. Such captures are not included among the droits of the Admiralty by the Order in Council of Charles II. ; and as they are not made by an exclusively naval force, they do not become prize to the captors under the Prize Acts and the proclamation, but are condemned by the Court of Admiralty as booty of war belonging to the Crown, which may dispose of it at pleasure, as in the case of booty captured by a land force alone. A conjunct expedition is a combined naval and military force set forth under special orders from the home government with instructions to effect a particular service in time of war. These instructions are of the essence of such an expedition ; for a combined naval and military force casually meeting and coalescing for a particular object, which may be detrimental to the enemy, does not constitute a conjunct expedition : and troops happening to be on board ships of war making captures at sea under such circumstances, are mere passengers, and do not alter the purely naval character of the capturing force. A conjunct expedition, however, may be set forth by governors and commanders-in-chief on foreign stations ; and if the home government afterwards approves of the enterprise, the effect is the same as if they had originally planned and ordered it. The point, however, to be borne in mind with reference to these conjunct expeditions appears to be, that the whole of the forces employed are to be viewed as one mixed and indivisible force, neither purely naval nor purely military. Hence, with respect to prizes taken at sea by conjunct expeditions of sea and land forces, it long remained a subject of some uneasiness between the two services, what was the claim of the military force acting with the navy on such occasions. Certainly no such claim could be maintained under the Prize Acts, for they pointed only to *naval* captors. At length came the case of the *Hoogskarpel*, which was one of several Dutch ships taken in Saldanha Bay, near the Cape of Good Hope, in 1781, by a conjoint force under

Commodore Johnstone and General Meadows, acting according to instructions under the King's sign-manual, which directed that all the *booty* taken by the expedition should be divided between the land and sea forces employed in it. The question of interest in these captures thus *made at sea* was first agitated in the Court of Admiralty, where the Judge pronounced for the interest of the army, "agreeably to the spirit of his Majesty's instructions." On appeal to the Lords, an elaborate judgment against the claims both of the army and navy was pronounced on the 30th June, 1786, by Earl Camden, then President of the Council, assisted by Lords Kenyon and Grantley. They laid it down that conjunct expeditions were entirely out of the Prize Act with reference to *both* the services; and that the whole property captured was therefore at the disposition of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted. It was argued for the navy that the co-operation of the army could not divert the title of the navy; that the interests of the navy were preserved, notwithstanding such co-operation, for that they were *takers* in a sufficient degree to answer the descriptive terms employed in the Prize Acts. But this argument was overruled, and the property was condemned to the Crown, and not to the captors. The principle of this decision was again asserted and acted upon by Lord Stowell, in the case of the French ships lying in harbour at the Isle of France, when that island was surrendered in 1810, under a capitulation, to Vice-Admiral Bertie and Lieut.-General the Hon. Ralph Abercrombie.¹ His lordship also took the same view of the subject in the important case of the booty taken in 1814, upon the surrender of Genoa to the combined sea and land forces under Admiral Sir E. Pellew and General Lord William Bentinck, to whom the Prince Regent had granted the property for distribution among the naval and military forces engaged on that occasion.² Greenwich Hospital, being entitled by Act of parliament to a per-centage on all naval prizes, made a

¹ La Bellone, 2 Dodson's Admiralty Reports, 343.

² Genoa, 2 Dodson's Admiralty Reports, 444.

claim to share in the Genoa booty, as upon a case of pure *prize*. But Lord Stowell rejected the claim, on the ground that the property in question was not prize, but booty, and therefore not within the terms of the Act of Parliament upon which the claim of the Hospital rested.¹

The captures hitherto considered are those in which the regular armed forces of the realm are principally concerned. But although land expeditions are never fitted out at private expense, maritime captures may yet be made by British ships not in the service of the Crown; and the prize interests acquired by such captors fall within the limits of the present inquiry. It has been already shown that if, during war, a British subject, without any commission from the Crown, should take an enemy's ship, the prize would not be the property of the captor, but would be one of the droits of the Admiralty², within the terms of the Order in Council of Charles II. In order, therefore, to encourage merchants and others to fit out privateers or armed ships in time of war, for reprisals against the enemy, the Lords of the Admiralty are from time to time empowered by act of parliament to grant commissions to the owners of such ships (see stat. 29 Geo. 2. c. 34., and 45 Geo. 3. c. 72.); and the prizes captured are divided between the owners and the captain and crew of the privateer. But the owners, before the commission is granted, give security to the Admiralty to make compensation for any violation of the treaties subsisting with those powers towards whom the nation is at peace³, and to forbear from employing any such vessel in smuggling (see 24 Geo. 3. c. 47.). These commissions are now upon all occasions called Letters of Marque; and the vessels bearing them are generally termed Privateers.⁴

¹ The distinction upon which this decision proceeded, is not likely to be of importance hereafter to officers in either service, as by an Act of Parliament, 57 Geo. 3. c. 127., the rights of Greenwich Hospital were extended to all captures made by the navy, or with its assistance, in the war then just terminated, and will probably receive a like extension in the event of any future naval war.

² Carthew's Reports, 399.

³ 2 Vernon's Reports, 592.

⁴ "The privateers in our wars are like the Mathematici (Astrologers) of old Rome, a sort of people that will always be found fault with, but still made use

Sometimes the Lords of the Admiralty have this authority by a proclamation from the King in Council, as was the case in December, 1780, when they were thus empowered to issue letters of marque against the Dutch.¹ Such commissions, however, are only available against countries at war with England: for if a letter of marque wilfully and knowingly take a ship and goods belonging to a nation at amity with England, this amounts to downright piracy.²

Letters of marque are only valid during the war, and may be vacated either by the express revocation of the Admiralty, or by the misconduct of the parties — as, for example, by their cruelty. This appears by the case of the *Marianne*³, where a proceeding was instituted on the part of the Admiralty against a privateer, to deprive her of her letter of marque. The case arose on a representation made by the master of the captured vessel to Captain Trower, of H. M. S. *Lark*, that one of two privateers that were the actual captors had fired into the *Marianne* after she had surrendered, and by that act had killed one of the men. Lord Stowell declared the offence charged to be of a very atrocious kind, and which if proved would draw with it a forfeiture of the letter of marque. His lordship, however, considered the evidence imperfect, and therefore dismissed the parties; but stated that the law was laid down by the Prize Act, which expressly inflicted upon all acts of cruelty the forfeiture of the letter of marque, and this the learned judge considered to be no more than a formal declaration of what was the ancient law of the Admiralty.

Formerly the Crown used to reserve to itself a share of all prizes captured by privateers; but by the last Prize Act

of." Sir Leoline Jenkins' Works, ii. 174. The United States of America in their treaty with Prussia, in 1785, agreed to employ no privateers in any future war with that country. It appears, however, that the privateering system was carried to a great extent by the States during the war with Great Britain; and the legislature of New York passed an Act conferring corporate powers, subject to compliance with certain formalities, on every association of five or more persons desirous of embarking in the adventure of privateering. See 1 Kent's Commentaries, 98. note.

¹ 1 Christian's Bla. Comm., c. 7., note.

² Molloy, cap. II. s. 23.

³ 5 Robinson's Admiralty Reports, 9.

(55 Geo. 3. c. 160. s. 17.), which expired with the war, the entire proceeds of all prizes and captures made by privateers were conferred upon the owners, without reserving any share to the Crown. And this will probably be again the rule when another naval war takes place.

Revenue cutters stand in some respects on the footing of privateers, as in time of war they carry letters of marque. But though they are maintained at the public expense, they acquire no beneficial interest in prizes by the act of capture, operations against the enemy not being the purpose for which they are employed. And by the last Prize Act, 55 Geo. 3. c. 160. s. 17., all prizes and captures made by armed vessels in the service of the custom house or excise were declared to belong to the Crown, and were to be applied and disposed of under the royal sign-manual.

By statute 45 Geo. 3. c. 72., which expired with the war, it was expressly forbidden to ransom any British ship or vessel taken by an enemy in time of war, unless in cases of extreme necessity, to be allowed by the Court of Admiralty; and, in all probability, a similar law would be re-enacted, in the event of a new war occurring.

After this general view of the subject, the prize interests of the army and navy will be successively considered.

I. Army Prize.

This branch of the subject lies within very narrow limits. Whenever the booty taken by a land force is bestowed by the Crown on the captors, the operation of the grant is confined to the particular occasion, and forms no rule or precedent from which the same or any other troops can deduce the slightest *legal* title or claim to a similar boon on any subsequent occasion. The captors owe their rights in every case to the pure bounty of the Crown.

But when the Crown has made the grant, the question arises, what particular troops shall be admitted to share in the distribution, as participators in the services from which the booty has arisen. Claims of this nature are sometimes of difficult adjustment; as troops moving at a distance from the

scene of action may, upon investigation, appear to have contributed greatly to the success of the capture. Therefore, when a royal warrant for distribution among the captors has been signed, if any controversy should arise as to the troops or forces properly to be deemed the captors, the point has usually been referred to the decision of the Privy Council, before whom the matter is argued in due form of law, and determined according to their view of the justice of the conflicting claims. But under the late Act, 3 & 4 Vict. c. 65., to which reference has already been made¹, the Court of Admiralty can now entertain such questions on a like reference from the Crown. There is seldom a doubt as to the forces actually present at the capture; but a grave and difficult question often arises on such occasions, whether certain specified forces were, by co-operation or otherwise, constructively concerned in the capture, so as to be equitably entitled to share in the booty; and this is a mixed question of law and fact and military usage. Co-operation, however, of some sort, must be proved. The last instance of this nature was the case of the Deccan prize money, the whole of which was claimed by Lieutenant General Sir Thomas Hislop and the Madras army under his immediate command, as the actual captors of the booty. But the Privy Council decided that the Bengal army, under the Marquis of Hastings, as Governor General and Commander-in-chief, though at a great distance from the scene of the capture, were nevertheless co-operating by their presence in the field, and by keeping native powers in check, who might have impeded the operations of the Madras army. Evidence was also given of the orders issued by Lord Hastings, indicative of his having assumed the supreme command over Sir T. Hislop and the Madras army: and on these grounds, the Privy Council held, after protracted legal discussions, that the Bengal army were constructive captors, and entitled as such to stand on the same footing with the Madras army with reference to the booty in question.

The relative amounts and proportions of the shares of the officers and men actually or constructively engaged in the

¹ *Supra*, p. 292.

expedition from which the prize money results, can seldom be matter of dispute, the scheme of apportionment being either prescribed by the royal warrant, or framed by the commissioners nominated by the proclamation to manage the distribution of the money. These commissioners are also constituted the sole judges of all claims relative to the distribution—so that, in the distribution of army prize, the ordinary legal tribunals exercise no jurisdiction whatever. And when Parliament votes a sum of money to any victorious army or body of troops, by way of reward for particular services, the foregoing rules and principles extend to such a grant, in exactly the same manner as if the money had arisen from an actual capture of booty.

The rights of the army with reference to prize money arising from captures made by land forces alone, or by conjunct expeditions of land and sea forces, are now regulated by an Act of Parliament passed in the early part of the reign of King William IV. By this statute (2 W. 4. c. 53.) it is enacted, with respect to all captures made by the army, royal artillery, provincial, black, and all other troops in the pay or service of the Crown, or belonging to the Crown, and in the pay of the East India Company, of any fortress or possession of the enemy, or of any ship or vessel in any road, river, haven, or creek belonging to such fortress or possession, and in all expeditions or actions from which prize money, bounty money, or grant shall arise, that the officers and soldiers engaged therein shall have such right and interest in the arms, ammunition, stores of war, goods, merchandise, booty, prize, and treasure so taken, *as the Crown shall think fit to be ordered*; and distribution shall be made according to such rule as the royal proclamation for the purpose shall direct. The Act makes similar provisions respecting the share of the army in all captures made by conjunct expeditions of land and naval forces of the Crown, after the property has been condemned by the Court of Admiralty (s. 29.). The Act effects no material alteration in the common law relating to prize and booty, but makes a number of provisions relative to the official administration of the proceeds. The booty is to be collected, valued, and sold by

prize agents appointed by the commanders and officers entitled thereto: one by the commanders-in-chief and field officers, and the other by the other commissioned officers entitled to share; and the profits of the agency are not to be shared by any persons other than the agents, under a penalty of 100*l*. The agents are not to be officers of Chelsea Hospital; and they are to render an account to the treasurer of the Hospital. All grants from the Crown, or from Parliament, or otherwise, to the officers and troops employed in any capture or expedition, unless otherwise directed, are to be received by the treasurer of Chelsea Hospital, for the use of the persons entitled thereto; and the treasurer is, at the end of three months, to give public notice of distribution. All assignments of prize money paid into Chelsea Hospital are declared invalid, unless the true consideration of the bargain be expressed therein; and the regimental debts of officers and others entitled to prize money may be stopped by order of the Secretary at War, out of their shares, and paid by the treasurer of the Hospital to the party making the claim. In all conjunct expeditions of land and naval forces, after the condemnation of the booty by the Court of Admiralty, the shares of the army are to be paid over to Chelsea Hospital for distribution, as in case of captures made by land forces alone. By the same Act deserters from the army are not to be entitled to prize money; and shares not claimed within six years after being paid, as directed by the Act, to the treasurer of Chelsea Hospital, are declared forfeited, unless upon good cause shown and allowed.

It has been already mentioned that, for want of a commission from the Admiralty, a land force cannot take prizes, properly so called; and that when a land force and a naval force jointly co-operate in an expedition or enterprise from which captures result, the army derives all its future interest in the proceeds of such captures from the bounty of the Crown, as in ordinary cases of booty taken by a land force alone.¹ But the circumstance of land forces doing duty as marines on board of men-of-war will not make the force a

¹ *Supra*, p. 286.; *Genoa*, 2 *Dodson's Admiralty Reports*, 444, 446.

mixed force. Captures, therefore, which are made by such ships are good naval prizes; and troops thus engaged will be entitled to share as marines under the prize proclamation (*suprà*, p. 292.), as matter of right, and not of favour. Such troops are, in truth, part of the armament of the ship in which they happen to serve.

Troops on board a fleet as passengers, and doing duty in action, are entitled, under the present proclamation, to rank only in the eleventh class; and in this respect officers and men so circumstanced would all be rated alike, and share accordingly, without distinction. The services, however, of troops so situated may be, on some occasions, exceedingly meritorious, and deserving of the highest scale of reward; and a feeling of this kind appears to have given rise, on the part of the naval officers engaged in the Copenhagen expedition of 1802, to a highly honourable arrangement, respecting which the following memorandum, in Lord Nelson's handwriting, has been published in the valuable collection of his despatches by Sir Harris Nicholas:—

MEMORANDUM.¹

(Autograph in the possession of Colonel Davison.)

Apparently written about July, 1802.

“From the very particular situation in which the Hon. Lieutenant-Colonel Stewart, with the troops under his command, were placed on board the fleet under the command of Sir Hyde Parker, for they certainly did not belong to any of the ships, therefore they were borne as supernumeraries; and they cannot be considered merely as passengers, therefore they must, in fairness, be considered as connected with the services of the fleet; and as the situation is entirely new, and being truly sensible that the army shared with us the toils and dangers of the expedition, we do, therefore (as the proclamation for the distribution of prize-money, nor any joint expedition, is in the smallest degree similar to the present), as a mark of our high sense of the services of the Hon. Colonel Stewart and the army, agree to give up a proportion of the Admiral's one-eighth of prize-money, so as to make Colonel Stewart's share of prize-money equal to that of a junior flag officer;

¹ 5 Nelson's Despatches.

and we hereby authorise our agent, Alexander Davison, Esq., to take from the one-eighth due to the class of Admirals such a sum as will make Colonel Stewart's share equal to a junior flag officer; and we are of opinion that the field officers of the 49th regiment ought to share with the captains of the navy, and the other classes according to their rank with the navy."

II. *Navy Prize.*

It has been already stated, that maritime captures are the only prizes properly so called, and that such captures are authorised by a royal order in Council at the commencement of hostilities. But every capture made under this authority must also be in accordance with the Law of Nations; and, under that law, prize may consist of ships and goods of the enemy, and also of ships and goods of neutrals.

Firstly, as to ships and goods of the *enemy*. Such property, whether employed for the purpose of war or of trade, or otherwise, is lawful prize, wherever found; and may be justly seized upon and brought to condemnation in a Court of Admiralty, where the rights of the captors will be declared by formal sentence of the judge. "Against the property of the enemy (says Lord Stowell) each belligerent has the extreme rights of war."¹

Previously to the last war with France, it was not usual to capture small fishing boats; but this was not a rule of law; and if brought in to an English port, they might be condemned like any other vessels of the enemy. Therefore, in 1798, some Dutch fishing boats, captured while engaged in the enemy's trade, were condemned by Lord Stowell as lawful prize; his lordship observing, that the ordinary rule with regard to such vessels prevailed only from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people.²

On the recapture of British ships which have been condemned by the enemy as prize of war, the general rule is,

¹ 2 Dodson's Admiralty Reports, 244.

² Young Jacob, 1 Robinson's Admiralty Reports, 20.

that such vessels are not prize to the recaptors, but the original owners are entitled to restitution on payment of salvage. But by the Prize Acts of the last war¹ it was provided, that if any British ship taken as prize should be *set forth for war* by the enemy, such ship, on recapture by a British force, should be liable to condemnation like any other regular prize. When, therefore, the *Ceylon*, a British ship taken by the *Bellone* and *Minerve* French frigates in the Indian seas, and afterwards employed with an increased armament in the public service of the enemy, under the command of a naval officer, was recaptured at the taking of the Isle of France, the Court held that she was, by the Law of Nations, good prize to the recaptors, as having been *set forth for war*, and condemned her accordingly.²

A prize, however, was held not to be *set forth for war* by the enemy, where she had been previously employed and armed as a slave ship, and merely an additional number of men were put on board, without her being commissioned by the government of the state to which the captors belonged.³ But if a prize were commissioned by the enemy as a privateer, she would be considered by the Court of Admiralty as *set forth for war*, and, consequently, as good prize, if recaptured.⁴

On the same principle, it was decided, in the case of the *Dash*⁵, that on the surrender of the island of Walcheren, a capitulation protecting *private* property generally did not include privateers. The *Dash* was found pierced for sixteen guns, with gun tackle, bolts, &c., in the harbour of Browsershaven, and was seized under the orders of Commodore Owen, commanding a division of H. M. ships engaged in the Walcheren expedition. A claim for restitution of this vessel was made by the owners, under the second article of the capitulation, by which it was stipulated that all private property should be protected. Her outfit and structure

¹ See 55 Geo. 3. c. 160. s. 5.

² The *Ceylon*, 1 Dodson's Admiralty Reports, 114.

³ 3 Robinson's Admiralty Reports, 10.; 6 Ibid. 320.

⁴ L'Actif, Edwards's Admiralty Reports, 185.

⁵ Edwards's Admiralty Reports, 271.

clearly indicated a military character; but at the time of the capture she had no crew on board, and was dismantled. Lord Stowell:—"That privateers are private property in one sense is certainly true; but they have at the same time a public character impressed upon them by their employment: though they are private property, they are still private property employed in the public service. And, therefore, if it should turn out that these ships have been equipped as privateers, for the purpose of cruising against the commerce of this country, I could have no hesitation in saying, that they are not a description of private property that can be brought within the provisions of the treaty. . . . I cannot for a moment assent to the doctrine that a privateer has no public character unless she is in actual employment at the time as such." The vessel was subsequently released, on proof that she had never been armed or used as a privateer.

An enemy's ship taken as a prize cannot be saved from condemnation by an allegation that she had been purchased by citizens of a neutral state; for the purchase of an enemy's vessel in time of war creates great suspicion of fraud: and, unless the good faith of the transaction can be shown in the clearest manner, the prize will be condemned as in ordinary cases.¹

The right of hostile capture is regulated, however, by certain geographical limits, beyond which the enemy's ships or goods cannot lawfully be taken. By the common courtesy of nations all neutral territory is excepted and protected from the operations of war, and where such territory is washed by the ocean, it is the general practice to consider the waters to the extent of three miles from the shore as part of the neutral dominion for domestic purposes.² The rule of law on this subject is thus expressed, "*terræ dominium finitur, ubi finitur armorum vis*:" and since the introduction of fire-arms that distance has usually been recognised to be about three miles or a marine league from the shore.³ The principle of the

¹ The *Bernon*, 1 Robinson's Admiralty Reports, 102.

² 2 Dodson's Admiralty Reports, 245.

³ 5 Robinson's Admiralty Reports, 385.

rule is, that the citizens of a neutral state may not be disturbed in their fishing, and particularly in their coasting trade, and communications between place and place during war, and that they may avoid the dangers to which they would obviously be exposed if hostilities were allowed to be carried on between belligerents within a shorter distance from the shore.¹

The sanctity of a neutral territory is very high. When the fact is established it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy; and if the captors should appear to have erred wilfully, and not merely through ignorance, they would be liable to further punishment.² "I am of opinion (says Lord Stowell) that no use of a neutral territory for the purposes of war is to be permitted; I do not say *remote* uses, such as procuring provisions and refreshments and acts of that nature, which the law of nations universally tolerates; but that no *proximate* acts of war are in any manner to be allowed to originate on neutral grounds."³ Direct hostility appears not to be necessary, for whatever has an immediate connection with it is forbidden; and therefore neither prisoners nor booty can lawfully be carried into neutral territory for detention, because such acts are in immediate continuation of hostilities. In the same manner an act of hostility is not to take its commencement in neutral territory. It is not sufficient to say it is not completed there. No measure can there be taken leading to immediate violence.⁴ Therefore, if a ship-of-war, accidentally lying in a neutral port, descries an enemy, she may go out and capture without thereby violating the peace or immunity of the neutral port, provided the engagement and the surrender take place beyond the limits of the port.⁵ She must not, however, fire a shot within neutral limits, even on a vessel lying beyond those limits; and where a

¹ 3 Haggard's Admiralty Reports, 289.

² 5 Robinson's Admiralty Reports, 16.

³ 3 Robinson's Admiralty Reports, 164.

⁵ 5 Robinson's Admiralty Reports, 18.

⁴ Ibid. 165.

British privateer, lying in a Dutch friendly port, sent out her boats armed and manned from thence, to make a capture, which they effected at a proper distance from the shore, Lord Stowell decreed the restitution of the prize on the ground that the launching, manning, and arming the boat on such an errand of force, was a direct act of hostility within a neutral territory, and therefore could not be sustained.¹

In claims for restitution of an enemy's ship on the ground of violation of neutral territory by the capture, the suggestion must proceed from the government whose territory is asserted to have been violated, and not from the parties interested in obtaining restitution.²

Secondly, as to ships and goods of *neutrals*. Such property is not liable to capture, unless the vessel be knowingly engaged in committing a breach of neutrality, which may be effected in various ways more or less direct. When war breaks out, it is necessary to shut up some of the avenues of commerce, because otherwise the belligerent rights of the hostile nations could not be fully maintained.³ At such times certain articles of trade which assist the prosecution of hostilities become contraband of war; and neutral vessels bound to the ports of either belligerent with cargoes of such articles on board, are liable to capture as prize by the cruisers of the other belligerent. This rule has for its foundation the necessities of self-defence in preventing the enemy from being supplied with the materials or instruments of war, and from having his means of annoyance and resistance augmented by the advantages of maritime commerce.⁴

The term "contraband" applies by the law of nations to all goods which can be considered munitions of war, under which description are comprehended every thing that can be made directly and obviously available to a hostile purpose, such as horses, arms, gunpowder and ammunition of all kinds, and every description of naval stores, such as timber for ship building, iron, hemp, ropes, or other tackle. On this prin-

¹ Twee Gebroeders, 3 Robinson's Admiralty Reports, 162.

² 3 Robinson's Admiralty Reports, 162. note.

³ 5 Robinson's Admiralty Reports, 168

⁴ 2 Dodson's Admiralty Reports, 244.

ciple a neutral American ship constructed for war, having been seized in port by the governor of St. Helena, was condemned as prize to the king on proof of an intention to sell her to the French governor of the Isle of France for hostile uses; the malignant nature of the purpose being not a little increased by the indecent levity with which the master expressed himself, that "she would be seen playing round the East India Company's ships in the Bay of Bengal next season." Lord Stowell pronounced it to be an extremely hostile act to be carrying a supply of a most powerful instrument of mischief, of contraband *ready made up*, to the enemy, and with an avowed knowledge that it would be applied to hostile purposes.¹ It appears also to be a settled principle, that any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation.² But the hostile character of a neutral cargo may vary according to circumstances. A cargo of cheese, for instance, or of other provisions, is not necessarily contraband. If fit for naval use and going to a port or place of naval equipment, it would be deemed contraband³; but not so if destined to an ordinary port, unless such destination be a mask to protect the cargo on its way to a naval arsenal.⁴

If a merchant vessel or *private* ship of the enemy be taken with the property of neutrals on board, such property may be reclaimed by the owners in the Court of Admiralty, when the prize is brought in for condemnation. The strictest proof of ownership is, however, required. But neutral property found on board an enemy's ship of war is good prize, and cannot be reclaimed by the owners; and the same rule applies to neutral property found on board an enemy's private ship, if she be furnished with a letter of marque: for such a vessel is manifestly a ship of war, and is not otherwise to be considered because she acted also in a commercial capacity.

¹ The Richmond, 5 Robinson's Admiralty Reports, 325.

² 1 Dodson's Admiralty Reports, 85.

³ 6 Robinson's Admiralty Reports, 95.

⁴ Ibid. 92.

The mercantile character being superadded does not predominate over or take away the other. A neutral merchant, therefore, putting his goods on board of such a ship runs all the risk of their condemnation in case of capture, in the same manner as if found on board a regular ship of war.¹

Though a cargo of naval stores, bound to an enemy's port, if taken after the notification of hostilities, is good prize, yet, where such a cargo is captured prior to the notification of hostilities, it will be restored by the Court of Admiralty.² So, also, where a neutral vessel, captured in time of war, is decided to have been wrongfully detained, restitution will be decreed by the Court of Admiralty, with compensation in costs and damages for the injury³; every nation being, by the law of nations, amenable to the other for all injuries done by sea or land, or in fresh waters or in port.⁴

From the right of preventing contraband traffic in time of war springs the *right of visitation and search*, which belligerent states are entitled by the law of nations to exercise towards ships carrying neutral colours, in order to ascertain their neutrality, their destinations, and the nature of their cargoes; the object of such inquiry being to determine whether they are employed in, or contributing to the service of the enemy, and, if necessary, to prevent the further prosecution of the voyage.

It is clearly laid down by the greatest modern authority on maritime belligerent rights — Lord Stowell — that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say," continues his lordship, "be the ships, the cargoes, and the destinations what they may; because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of

¹ Fanny, 1 Dodson's Admiralty Reports, 443.

² Hay and Marriott, 175.

³ 2 Dodson's Admiralty Reports, 244.

⁴ Per Lord Mansfield, in *Lindo v. Lord Rodney*, Douglas's Reports, 595.

visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture: because, if you were not at liberty to ascertain, by sufficient inquiry, whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject.”¹

Neutral vessels, therefore, even though erroneously detained or taken as prize, may yet be condemned as such, if they offer improper resistance to the right of search. “It is a wild conceit,” says Lord Stowell, “that wherever force is used it may be forcibly resisted: a lawful force cannot lawfully be resisted.”² Neutrals render themselves enemies by a hostile opposition to lawful inquiry.³ “A merchant vessel,” observed Lord Stowell in another case, “has not a right to say for itself, ‘I will submit to no inquiry, but I will take the law into my own hands by force.’ What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is any thing like an equality of force or equality of spirit.”⁴ And it makes no difference, even though the neutral merchantman be accompanied and protected by a man-of-war of her own nation as a convoy.⁵

A similar rule applies to neutral ships attempting a rescue after capture or submission; for this also is breach of neutrality, and a clear violation of the law of nations.⁶ “The

¹ 1 Robinson's Admiralty Reports, 360.

² Ibid.

³ 1 Ibid. 374.

⁴ Ibid. 279.

⁵ The Maria, *ibid.* 340. In the proclamation issued by Denmark in the war of 1848 against Germany, it was announced that neutrals under convoy would not be boarded, credit being given to their governments for the due observance of neutrality.

⁶ The Dispatch, 3 Robinson's Admiralty Reports, 278. Washington, 2 Acton's Reports, 30, note.

principle of this rule," says Lord Stowell, "is founded on the soundest maxims of justice and humanity. If neutral crews may be allowed to resort to violence to withdraw themselves out of the possession taken by a lawful cruiser, for the purpose of a legal inquiry, and may (as it has been termed) *hustle* them out of the command of the vessel, the whole business of the detention of neutral ships will become a scene of mutual hostility and contention; the crews of neutral ships must be guarded with all the severity and strictness practised upon actual prisoners of war, for the same measures of precaution and distrust will become equally necessary; the intercourse of nations neutral and friendly towards each other will be embittered by acts of hostility mutually committed by their subjects. . . . It is the law, and not the force of the parties, that must be looked to as the redresser of wrongs that may have been done by the one to the other."¹

But where a citizen of a hostile state happens to be the commander of a neutral ship, resistance to the right of search does not draw after it a condemnation of the ship: for he, being an enemy, is not bound by the duties of neutrality, and, if he can withdraw himself, he has a right to do so. On the same principle he has a right to rescue the neutral ship, if taken; for, as an enemy, he is rendered by the capture a prisoner of war, and, unless he be on his parole, he has a perfect right to emancipate himself by seizing his own vessel.² In order, however, to subject a neutral vessel to condemnation for an attempt at rescue, positive resistance to the captors must be proved to have been actually made³; for the refusal to render assistance to the captors is no violation of neutrality: and on this principle the master and crew of a neutral vessel are not bound to assist the captors in navigating her to a port for adjudication, and commit no breach of neutrality by passively refusing such assistance.⁴

It must be shown also, in cases of doubt, that the neutral vessel had reasonable grounds to be satisfied of the existence of a war; otherwise the neutral character does not arise;

¹ 3 Robinson's Admiralty Reports, 279.

² 5 Robinson's Admiralty Reports, 232.

³ 1 Acton's Reports, 233.

⁴ *Ibid.*

nor is there in that case any foundation for the several duties which the law of nations imposes on that character; if, therefore, at the time of a neutral ship leaving port, her owner or commander had no knowledge or contemplation of a war, there is no crime in resisting the right of search.¹

It is allowed, however, by Lord Stowell, that cases may occur in which a neutral ship would be justified by the natural rights of self-preservation to defend itself from extreme violence threatened by a cruiser grossly abusing his commission; though, in all ordinary cases, it is the duty of a neutral to submit to the captor, and rely on the legal remedy of costs and damages against him, if he should be proved to have acted vexatiously.²

Neutral vessels may also act in an unneutral way, and expose themselves to condemnation, by conveying the military or other public officers of a belligerent country on missions of public service connected with the war. Accordingly, the *Friendship*, a neutral American vessel carrying persons in the military service of the enemy, and under the direction of a public officer of the French government, was condemned by Lord Stowell as good prize, in the character of an enemy's transport.³ His Lordship, on the same principle, condemned the *Orozembo*, another American neutral vessel, which had been chartered for the purpose of conveying three military officers to Batavia, under the special appointment of the Dutch government, then at war with England.⁴

Lord Stowell thought also, though the point had never been decided, that, on principle, the conveyance of *civilians* filling a public character would stand on the same footing: for whenever it is of sufficient importance to the enemy that such persons should be sent out at the public expense, it should afford equal ground of forfeiture against the neutral vessel employed for a purpose so intimately connected with the hostile operations.⁵

¹ 5 Robinson's Admiralty Reports, 33.

² 1 Robinson's Admiralty Reports, 374.

³ 6 Robinson's Admiralty Reports, 420.

⁴ Ibid. 430. ⁵ 6 Robinson's Admiralty Reports, 434.

Carrying despatches for the enemy from any part of his dominions is also unneutral conduct, which exposes a neutral ship to condemnation. This was decided by Lord Stowell in the case of the *Atalanta*¹, taken on her voyage from Batavia to Bremen, in July, 1807; the vessel having come last from the Isle of France, where she took on board a packet from the French governor of that island to the Minister of Marine at Paris; the packet being found concealed in the possession of one of the supercargoes. It is the right of the belligerent to intercept and cut off all communication between the different parts of the enemy's dominions, and to harass and disturb to the utmost the maintenance of the connection and intercourse between his provinces. It is not to be said, this or that letter is of small moment; the true criterion will be, is it on the public business of the state, and passing between public persons for the public service? *That* is the question. If individuals take papers coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the Court of Admiralty will not split hairs, nor consider their relative importance. What appears small in *words*, or what may perhaps be artfully disguised, may relate to objects of infinite importance, known only to the enemy, and of which the Court has no means of judging.² The general rule of law is, that where a party has been guilty of an *interposition* in the war, he places himself on the footing of an enemy: and the conveyance of French despatches by the *Atalanta* was, in the opinion of the Court, an aggravated case of active interposition in the service of the enemy.³

The *Hope*, an American vessel, captured on a voyage from Bordeaux to New York, having on board various despatches.

¹ 3 Robinson's Admiralty Reports, 440.

² Ibid. 465.

³ Ibid. 440.

to the officers of government in the French West India islands and the Isle of France, fell within the same rule. There was, in this case, the aggravating circumstance, that a French military officer of rank, aide-de-camp to General Villaret, who had lately come from Martinique, had been knowingly received on board in the character of a merchant's clerk, going to New York to settle some outstanding accounts. Lord Stowell condemned the *Hope* as good prize.¹

But despatches from ambassadors of the enemy, resident in a state at amity with England, may be carried by neutral ships without exposing them to condemnation; ambassadors being, in a peculiar manner, objects of the protection and favour of the law of nations.² A neutral country has a right to preserve its own relations with the enemy, and the Court of Admiralty will never presume that any communication between them can partake in any degree of the nature of hostility against England.³

Where, however, the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or one to which, though not neutral, an open trade is allowed, the neutral master's ignorance of the nature of the despatches may be admitted as a defence or excuse; because, in such a case, there is less to excite his vigilance, which he is never allowed to intermit when the voyage commences in a hostile country, and still less when the letters there put on board are addressed to persons resident in a hostile country.⁴

Suppression, destruction, or spoliation of a ship's papers by the neutral masters is a strong ground for suspicion of unneutral conduct in execution or in contemplation; but these circumstances are not enough by themselves to induce the condemnation of the ship by the Court of Admiralty. The suspicion thus created cannot be explained away by a mere allegation that the papers in question were only private letters or documents, not relating to the ship or her cargo.⁵

¹ 3 Robinson's Admiralty Reports, 463. note.

² Ibid. 461.

³ Ibid. 465.

⁴ The *Rapid*, Edwards's Admiralty Reports, 228.

⁵ 1 Robinson's Admiralty Reports, 133.; 2 Ibid. 104.

At the same time the Court does allow evidence to be given to rebut the presumption of unneutral conduct arising out of such circumstances.¹

Neutral vessels may also be guilty of unneutral conduct by violating, or attempting to violate, a blockade; for this contributes to sustain the commerce of the blockaded port, which it is the business of the blockading force totally to cut off and prevent; and neutral vessels thus offending are liable to capture and condemnation as prize by the law of nations. Carrying a cargo to a blockaded port after notice of the blockade is of course an obvious breach of the rule in question; but it is clearly laid down by the highest modern authority in maritime law, that after the commencement of a blockade a neutral cannot be allowed to interpose in any way to assist the *exportation* of the property of the enemy, nor even to make any purchase in the blockaded port.² "A blockade (says Lord Stowell) is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation. . . . A neutral ship departing can only take away a cargo *bonâ fide purchased and delivered* before the commencement of the blockade: if she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade."³

Even though a warning may be required by special treaty with a neutral state before her vessel can be condemned for violation of a blockade, Lord Stowell held this to be necessary only where a vessel sailed without previous notice of the existence of the blockade, for if the neutral ship had knowledge of the fact, a warning becomes a mere idle ceremony, of no use, and therefore not to be required.⁴ Sailing with intent to break the blockade is an undoubted violation of the

¹ 1 Dodson's Admiralty Reports, 480.

² 1 Robinson's Admiralty Reports, 93, 94.

³ Ibid. 153.

⁴ Ibid. 156.

law of nations, and subjects the neutral vessel so acting to condemnation on due proof of that fact.¹ The casual circumstance of the wind keeping the blockading force at a distance will not save a neutral ship from condemnation, if it attempts to break a notified blockade, by seizing such an opportunity of entering the prohibited port; for a blockade is still legally existing, although the wind may occasionally blow off the blockading squadron. Such accidental changes must take place in every blockade, but the blockade is not thereby suspended; and any attempt to take advantage of such a casual removal of the blockading force is in law an attempt to break the blockade by fraud, and therefore a violation of the law of nations.²

On the question of blockade, therefore, three things must be proved, in order to obtain the condemnation of a neutral ship as prize: 1. The existence of an *actual* blockade; 2. The knowledge of the party; and 3dly, some wilful act of violation, either by going in or by coming out, with a cargo laden after the commencement of a blockade.³

As trade with a hostile country is forbidden in time of war, it is usual for the crown, on certain emergencies, to grant licenses, either to British subjects or to citizens of hostile states, to make a specified voyage, or to carry cargoes of enumerated goods: and vessels thus licensed are protected from condemnation as prize, if captured by British cruisers in the orderly course of hostilities. The licensing system was carried to a considerable extent during the long war with France at the commencement of the present century. It will be sufficient, however, here to point out, that, in order to give full protection, the license must be granted before the time of capture: for a ship taken on a prohibited voyage, and afterwards obtaining a license bearing a date anterior to the capture, will not thereby obtain protection so as to nullify the condemnation.⁴ But a prospective license from the crown for a voyage from the enemy's country,

¹ 1 Robinson's Admiralty Reports, 156.

² Ibid.

³ Ibid. 93.

⁴ The Vrow, 1 Dodson's Admiralty Reports, 167.

though granted after the voyage is commenced, is sufficient to legalise the voyage as against subsequent captors.¹ A vessel homeward-bound on a licensed voyage is not liable to condemnation while proceeding on such voyage, even after the expiration of the license.² Proof, however, must be given of circumstances; such as an embargo, or the force of the elements, or other impediments, in order to protect a vessel found at sea after her license has expired.³

The foregoing considerations apply to every species of maritime capture. But it remains to notice a few general rules which affect the prize interests of naval officers; as the Court of Admiralty is governed by these rules, in deciding whether a capture falls within the provisions of the Prize Acts and the royal proclamation, so as to give the benefit to the captors.

1. There must be an existing or continuing war: for if hostilities have ceased, either by a treaty of peace or an armistice, all captures made after the time appointed for the termination or suspension of hostilities are invalid, and prizes so taken will be restored. Thus, the British ship *Somerset*, bound from Alicant to Bristol, having been captured and made good prize to the American privateer *Macedonian*, on the 7th of March, 1815, after the ratification of the treaty of peace between England and the United States, but within the thirty days allowed by the treaty for captures in the part of the world where the *Somerset* was taken, it happened that, on the 31st of the same month, and after the expiration of those thirty days, the *Somerset* was retaken by H. M. S. *Erne*, while in ignorance of the treaty of peace: Lord Stowell held that the *Erne* had obtained no lawful prize, and decreed the restitution of the *Somerset* to the American captors.⁴

2. The capture must be made by an exclusively naval force. If there be the co-operation of a land force, though the Court of Admiralty still has jurisdiction over the capture

¹ *Henry v. Stainforth*, 4 Campbell's Reports, 270.

² *The Actæon*, 2 Dodson's Admiralty Reports, 53.

³ *The Goede Hoop*, Edwards's Admiralty Reports, 327.

⁴ *Somerset*, 2 Dodson's Admiralty Reports, 56.

for the purpose of condemnation, yet the captors take no benefit under the Prize Acts and the proclamation; and the prize or booty belongs to the Crown.

So, also, where the capture is made by a conjunct expedition of a British naval force and an allied army, this is alone sufficient to withdraw the case from the operation of the Prize Act; and the British captors wholly depend on the bounty of the Crown for any advantage of the capture.¹ Thus, on the capture of French Guiana by an English squadron of ships under Sir James Yeo, in conjunction with a Portuguese force, the property taken by the allied forces in that expedition was brought to England, and condemned by the Court of Admiralty as prize of war belonging to the Crown, and not to the captors.²

The case above cited of the Genoa booty likewise shows that captures made by a mixed British naval and military force are not prize to the captors, but to the Crown, because the force employed is not wholly commissioned by the Admiralty.³ We have seen also, in the case put by Lord Stowell of a ship being made to strike by the guns of Dover Castle, that a land force, as it has no commission from the Admiralty, cannot take maritime prize for its own benefit, and that a prize so taken would become a droit of the Admiralty as a non-commissioned capture⁴: of which rule there is an instance in the case of a vessel captured in the harbour of Gibraltar by order of Colonel Roger Elliott, lieutenant-governor; the prize being condemned as a droit of the Admiralty.⁵

The distinction, however, between a land force and a maritime force is sometimes difficult to establish in practice: for the case of the *Rebekah*⁶, a capture made from the land by the crews of H. M. S. *Sandfly* and *Badger*, stationed at the Island of St. Marcon, was adjudged to be a true naval capture, and therefore not a droit of Admiralty, but good

¹ 5 Robinson's Admiralty Reports, 350.

² 2 Dodson's Admiralty Reports, 151.

³ *Suprà*, p. 297.

⁴ *Suprà*, p. 295.

⁵ *Notra Signora del Carmen*, 1 Robinson's Admiralty Reports, 228. note.

⁶ 1 Robinson's Admiralty Reports, 227.

prize to the actual captors, under the following circumstances : — The *Rebekah* put into St. Marcon for safety, was fired at from the fort, and immediately struck her colours. She continued to ride there a whole day before possession was taken ; and possession was at last taken by a boat's crew coming off from the fort. The Admiralty claimed the prize as a non-commissioned capture made by a land force ; but the Court decided, on the evidence, that the case was one of maritime capture by a purely naval force. Lord Stowell : — “ The claim of the Admiralty must be supported, if at all, on the ground that this was a capture made from the land, and by a land force, and, therefore, not a *maritime* capture by persons commissioned to take for their own benefit. . . . I do not think it quite enough to say that the persons here were naval commissioned persons, and consequently entitled to the benefit of all property taken on the sea ; but I think the peculiar nature and quality of the place where the capture was effected, is to be added to the consideration. What is St. Marcon ? It is certified by the commander-in-chief, that there is no garrison nor any military establishment whatever — it is a mere *naval* station used for the temporary accommodation of the crews of these ships of war. There is not a person upon it who is not borne upon the ships' books, and who is not a part of their crews : they have their ships' pay, the ships' victuals, and the ships' officers to command them. The blockhouses which they have constructed are mounted with their own ship guns, with the addition of a few spare guns otherwise procured. The whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place so selected and so employed, is hardly to be considered as anything else than a part or appendage of the naval force : it is a sort of stationary tender, rather attached to and dependent upon these vessels, than having the vessels attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress possessed by a military garrison. The capture, then, was effected by naval commissioned persons, using a force immediately sub-

ject to their use, and from its peculiar circumstances sufficiently naval in itself to be distinguished from an ordinary land force subject to military persons. It is a maritime capture, effected regularly by a maritime force. . . . I shall pronounce for the claim of prize, under the King's proclamation and the Prize Acts."

3. The naval force effecting the capture must also be *duly commissioned*. The Admiralty is, in the language of Lord Stowell, "the great fountain of maritime authority;" and no title to sea-prize can be maintained by the captors, except under commissions derived from that authority. It follows, therefore, that if a prize be taken by a maritime force bearing no such commission, the prize becomes a *droit* of the Admiralty as a non-commissioned capture, and does not pass to the captors under the proclamation. This clearly appears from the very terms of the Order in Council of Charles II., already cited, which declares that all non-commissioned captures belong to the Lord High Admiral. And it makes no difference, even if the non-commissioned ship has made the capture under the orders of a naval officer. This appears by the case of the *Anna Maria*¹, in which H. M. S. *Sandwich* made a claim of joint-capture, on the ground of the prize having been taken by his Majesty's armed tender the *Minerva*, attached to and in the service of the *Sandwich*, and commanded by one of her lieutenants, acting under orders received from her. But as the claimants produced no written order from the Admiralty for attaching this tender to the *Sandwich*, the Court held that the claim could not be substantiated without such evidence. The same point arose also in the case of the *Assistance* cutter², which having been hired by the captain of H. M. S. *Dragon* to act as her tender, put to sea, under the command of a midshipman of the *Dragon*, on a cruise to impress mariners from homeward-bound ships. While thus employed she took a foreign ship, of which the *Dragon* claimed the benefit as lawful prize to her tender; but the Court of Admiralty decided it to be a non-

¹ 3 Robinson's Admiralty Reports, 211.

² The *Melomane*, 5 Robinson's Admiralty Reports, 41.

commissioned capture, in which neither the Dragon nor her tender took any prize interest. "Surely (said Lord Stowell) it is not to be maintained that an officer by putting his men on board can constitute a ship to be a part of the navy of Great Britain? Such a character is not, in my opinion, to be impressed without the intervention of some public authority. If the contrary could be held, this must follow, that an officer of a large ship might form out of these tenders as many ships-of-war as he pleased. He might compose a fleet. It is said that a similar practice has been not unfrequent in the West Indies. But every body knows that in remote situations the principal persons in command must necessarily be intrusted with a greater latitude of discretion. They grant commissions for the same reason: and if these commissions are afterwards confirmed by the Admiralty, they rank from the original date. If a case of this description were to come before the Court from any such remote station, the Court would have to consider how far the particular circumstances would bear it out in point of validity. At home the case is very different. When an officer has it in his power to refer instantly to the Admiralty, the same effect will not follow." In the foregoing case it was quite clear that the Assistance had no letter of marque, and was not commissioned in the navy. She had, therefore, no recognised legal character, in which she could make captures for private benefit; and her prizes, therefore, became droits of the Admiralty.

Subsequently to the foregoing decision, in the case of the *Melomane*, against the competency of King's ships on home stations to constitute or adopt tenders manned from their crew, to be a part of the force authorised under the original commission of the King's ship, a similar question arose before the Lords of Appeal in Prize Causes, as to the effect of such a practice in the West Indies on the claim of *H. M. S. Abergavenny* to share in the capture of *Curaçoa*, in virtue of the presence and co-operation of a tender so constituted, and sent out to cruise by the captain of the *Abergavenny* without the intervention of any public authority: and their lordships decided against the claim, on the ground that the tender was

a non-commissioned vessel.¹ To prove, therefore, that a vessel is a tender, it must be shown either that there has been some express designation of her in that character by the orders of the Admiralty, or that there has been a constant employment and occupation in a manner peculiar to tenders, equivalent to express designation, and sufficient to impress that character upon her. The former species of proof would undoubtedly be the most desirable.²

The same principle applies also to captures made by officers and men in the naval service, acting on shore and using appliances found upon the land; for prizes so taken become in like manner droits of the Admiralty, and not the property of the captors. "I think (says Lord Stowell) that cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the Admiralty, and not themselves, by a capture made upon the sea by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man-of-war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, such as may be met with in many parts of the coast, and by means of such battery or fort compelled such a ship to strike, I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and *without any right under their commission*, would be a droit of Admiralty, and nothing more.³

A privateer's commission must be actually sealed and issued before she can take a prize for her own benefit. A mere application for a letter of marque will not suffice. On the commencement of hostilities against the Dutch in 1780, the owners of the *Spitfire* fitted her out as a privateer, sent her on a cruise, and applied for letters of marque. The warrant for the grant of the letters of marque issued from the Admiralty on the 29th December, 1780; but by reason

¹ 5 Robinson's Admiralty Reports, 282. note.

² 5 Robinson's Admiralty Reports, 282.; per Lord Stowell.

³ 1 Robinson's Admiralty Reports, 235, 236.

of the great flood of business then in the Court of Admiralty, the Judge was unable to seal the letters of marque till the 1st January, 1781. The Spitfire, however, made a capture on the previous day; but notwithstanding her previous application for a commission, sanctioned, as it had been, by the warrant of the Lords of the Admiralty for its passing, this was held not sufficient to give her a prize interest in any captures until the commission was actually issued, and the prize was, therefore, condemned as a droit of the Admiralty.¹

If England be at war with different states, the commission issued to a privateer ought to include all such states, or the privateer ought to have separate commissions against each. Otherwise, if a captain having a commission only against the French, should fall in with and capture a Spaniard, this would be a non-commissioned capture, and therefore no prize to the captors.²

4. The capture must, according to the common law of the Admiralty, be made at sea, as distinguished from any port, haven, creek, or roadstead; for prizes so taken within the limits of the British dominions or possessions, are in strictness droits of the Admiralty, and not within the terms of the royal proclamation; while prizes so taken in *foreign* ports, creeks, havens, or roadsteads are likewise not pure naval prize, and consequently not the property of the captors, unless by virtue of an Act of Parliament.

In the case of the *Rebekah*³, already cited, one ground on which the Admiralty denied the right of the captors to the prize was, that the scene of the capture in the strait of St. Marcon was, in fact, a roadstead, and not the open sea. It appeared, however, that the *Rebekah* struck her colours while actually under sail, immediately before she entered the strait; and Lord Stowell in deciding that St. Marcon was not a roadstead, adverted to all these points in the following terms: — “Every anchorage ground is not a roadstead: a roadstead is a known general station for ships, *statio tutissima nautis*,

¹ 2 Robinson's Admiralty Reports, 285. note.

² The *Sacra Familia*, 5 Robinson's Admiralty Reports, 360.

³ 1 Robinson's Admiralty Reports, 227; and *supra*, p. 320.

notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself. . . . If that were so, the Lord High Admiral would be entitled to all captures made within a moderate distance of most parts of the coasts of England and Ireland and the foreign dominions belonging to them, which assuredly is not the case; for who would say that if a ship at anchor in the Channel of Dover is seized by a commissioned cruiser, the admiral is entitled? It should seem that these small and barren rocks [of St. Marcon] enclose no portion of the sea that can strictly be considered [as a roadstead]. It is a pretty open strait running between them and the coast of France, where ships may ride as they may do in other open parts of the French coast. . . . I think the striking of the colours was the real *deditio*. . . . And if so, the next question will be, where the vessel was at the time this act took place. . . . She had not entered the road, and she was *under sail* when she struck her colours. In point of locality then, the claim of the admiral is not founded. . . . She was about to enter, but was not actually entering, and that is the point at which the Admiralty right commences."

To support the right of the Admiralty to captures made in roads, it must be shown in every case that the road was at least so connected with the common uses of the port, as to constitute a *part of the port* in which the capture is alleged to have been made. It must be a place where vessels not only arrive, but take up their station for the purpose of delivering their cargoes in the ordinary course of commerce.¹

But with a view to the encouragement of the navy, captures made by that service, of fortresses on land, and of ships and goods in creeks, rivers, havens, and roads, were by the Prize Act of 1805 rendered good prize to the captors; and such captures were to be dealt with by the Court of Admiralty as in cases of regular prize.² This Act expired when peace was made with France in 1814. But on the renewal of hostilities in 1815, the same benefits were given to the naval service by the Prize Act of that year.³ And under

¹ The *Maria Françoise*, 6 Robinson's Admiralty Reports, 300.

² 45 Geo. 3. c. 72.

³ 55 Geo. 3. c. 160.

those Prize Acts the navy accordingly had the full benefit of various captures, which otherwise, according to what may be termed the common law of the Admiralty, would have been condemned as prize to the Crown. Under these acts privateers also enjoyed the same advantages as ships of the Royal Navy; and if a new naval war should spring up, it is probable that similar acts would be again passed by the legislature. These acts, however, did not extend to captures made by conjoint expeditions of sea and land forces, so that prizes taken in a foreign roadstead, creek, or harbour by a mixed force of this kind, still continued prize to the Crown, and not to the captors.

Parliamentary grants of money for the reward of the forces engaged in any particular service, stand upon the same footing as prize or booty in determining the rights of parties claiming to share in the distribution. In May, 1815, certain Neapolitan ships-of-war and stores of great value were surrendered to Captain Campbell, of H. M. S. *Tremendous*, senior officer of the British squadron in the Bay of Naples, but were afterwards restored by the British government. In June, 1816, parliament voted 150,000*l.* for distribution to the officers and crews of the squadron, in respect of the ships &c. thus restored. Upon a claim of Sir Charles Burrard, Bart., commander of H. M.'s brig *Grasshopper*, for the admission of that vessel to participate in the grant as a joint-captor, Lord Stowell held that the grant was to be considered as of the nature of prize-money, and to be dealt with entirely on that footing. His lordship therefore received the evidence laid before the Court of Admiralty on behalf of the *Grasshopper*, and eventually gave judgment in her favour.¹

But the Court of Admiralty will not entertain the question whether a grant made to the navy alone in lieu of prize, ought to have been made to the army and navy, as forming a conjoint expedition. It must take the grant as it finds it, and apply it accordingly.²

¹ Naples Grant, 2 Dodson's Admiralty Reports, 273.

² Booty in the Peninsula, 1 Haggard's Admiralty Reports, 53.

If an officer dies, or is killed in battle after giving orders, he is considered as a captor with respect to a share in the prize, and his executors are entitled to claim it accordingly.¹ Upon this point the law was laid down by Sir William Grant, Master of the Rolls², that, though the property be completely vested in the captors until condemnation, yet after condemnation it is, by relation, considered as theirs from the time of the capture. “. . . The intention of the Crown (said his Honour) in all cases of this kind is to put what is in strictness matter of bounty upon the footing of right. The service performed is thought worthy of reward: and though the party performing it died before payment, the claim of bounty from the Crown is considered as transmissible to his representatives, in the same plight and condition as the claim for wages or any other stipulated or legal remuneration of service.”³

If a naval officer, borne on the books of his ship, be *under suspension* at the time of a capture, and be afterwards acquitted of the charge, his right to prize-money revives on his acquittal. Thus in April, 1781, Captain Evelyn Sutton, of H. M. S. *Isis*, one of the squadron employed in the expedition against the Cape of Good Hope, was put under arrest by Commodore Johnstone, for disobedience of orders and signals in an affair with the French fleet in Porto Praya Bay; and the Hon. Captain Lumley, then master and commander of the *Oporto*, was appointed to command the *Isis* until the court-martial on Captain Sutton should be held. In July following, the *Isis*, under the orders of Captain Lumley, as acting commander, but with Captain Sutton *still on board*, took part with the squadron in the capture of some Dutch prizes in Saldanha Bay; after which the *Isis* carried Captain Sutton to the East Indies, where he was superseded by Sir Edward Hughes, and sent to England for trial. He was honourably acquitted; and the question was then raised whether he or Captain Lumley was entitled to prize-money as captain of the *Isis*. The Court of King's Bench de-

¹ 1 H. Blackstone's Reports, 267. *arg.*

² Stevens v. Bagwell, 15 Vesey's Reports, 152.

³ Ibid.

cided, that though Captain Sutton was under suspension at the time of the capture, that suspension was not sufficient to deprive him of the advantages belonging to his rank and station, in the event of his being afterwards acquitted by the court-martial. Captain Sutton, therefore, recovered his prize-money as captain of the *Isis*. Lord Kenyon:—"The person who stands on the ship's books in the situation of captain of the ship, and who is *actually on board* at the time of the capture, is entitled to the captain's share of the prize-money; and here the defendant (Captain Sutton) answers that description."¹ It followed as a consequence from this decision, that Captain Lumley took only the share of a supernumerary.²

But where an officer is *absolutely dismissed* from his ship, his subsequent restoration with a new commission of the old date will not revive his rights to prize-money on captures made by his ship during his absence. Thus where Mr. Allan, commander of the *Hinde* Revenue Cutter, was *dismissed* from his ship, on charges of inactivity and inattention to duty, and his commission and instructions were called in and cancelled, yet on his subsequent restoration to the same ship, with a new commission bearing the same date as the old one, he was held not entitled, under the king's proclamation of November, 1803, to the commander's share, which he claimed of a prize taken in the interval between his dismissal and restoration: while Pitt, the mate of the *Hinde*, who had received a temporary commission of commander *until another commander* should be appointed in the room of Allan, was held, as against him, to have a good title to the commander's share of the prize which was taken by him while he held his temporary commission: the king's proclamation, speaking of the shares as a reward for the service performed, but Allan having had no hand in such service.³

Upon the principles above stated, a captor of a prize may

¹ Lumley v. Sutton, 8 Term Reports, 224.

² Under the proclamation of Queen Victoria, an officer in the position of Captain Lumley would, it is presumed, be entitled to share according to his rank. See the clause, *supra*, p. 289.

³ Pitt v. Taylor, 11 East's Reports, 413.

effectually assign his share before condemnation.¹ But the instrument of assignment must be in the form prescribed by the statute 1 Wm. 4. c. 20. § 72.² and if the Court of Admiralty should pronounce the capture not to be good prize to the captors, the presumptive right of property which they acquired at the moment when the prize surrendered to them, is totally at an end.

By the same Act, prize-money, bounty-money, &c., not claimed within six years, are forfeited to the Crown: but the Lords of the Admiralty, on sufficient cause shown, may authorise the payment, notwithstanding the forfeiture.

ART. V.—THE FEE-SYSTEM.

1. *Report from the Select Committee on Fees in Courts of Law and Equity, together with the Minutes of Evidence, Appendix, and Index, ordered to be printed 9th July, 1847.*
2. *First Report of Committee of this Parliament, ordered to be printed, March, 1848.*
3. *Second Report, ordered to be printed, 8th May, 1848.*

THIS committee has done some service. We could, indeed, have wished that it had taken from the first a wider range of inquiry. It is very useful to hunt up this small deer of clerks, and to take care that they duly pay over all the three halfpennies that they receive; but in the present state of the Court of Chancery, and of public feeling respecting it, to consider this as the great grievance in connection with it would be indeed to pay tithe of mint and cummin, and to neglect the weightier matters of the law. While we are glad, therefore, that inquiry into these matters has been made, we are also glad that the Committee did not limit its inquiries to this, as we were at first afraid they would do. It would, indeed, have been difficult to have stopped there. Some of the witnesses examined let fall such strong words as invited

¹ *Murrough v. Cowyns*, 1 Wils. 211.

² *Turtle v. Hartwell*, 6 Term Reports, 426.

inquiry into other subjects, and more especially into the Masters' Office.

We shall endeavour, on the present occasion, to present to our readers the most important portions of the evidence taken by the Committee with respect to the present fee-system, and we think it will amply repay perusal. It may be a humble duty, but not the less useful on that account. And let us first see what is and what is not considered a legal fee. It seems pretty clear, that if many of the existing fees were disputed, it would be found difficult to recover them. The doctrine held by Mr. Hankins, the law clerk to the Treasury, respecting fees is, that in the common law courts a fifty years' uninterrupted taking constitutes a legal fee under the act 1 & 2 W. 4. c. 35. But Mr. Hankins admits that the payment of such a fee has been refused.

67. Did you ever know instances of actions being brought to recover fees?—*Mr. Hankins*: I know of two instances. I do not remember the times; but they were both abandoned.

68. You mentioned, just now, the case of the clerk of the justices; have you ever known a clerk of the justices bring an action to recover a fee which he had demanded on entering a plea of not guilty?—No.

69. Did you ever know a clerk of the peace bring an action to recover a fee which he had demanded on entering an acquittal?—No; I have heard frequently that those fees have been disputed.

70. Do you know, in point of fact, that it has been the common practice with persons of whom those fees have been demanded to refuse payment of them?—Yes; I know that has been the case.

71. Did you ever hear that parties had pleaded guilty in order to get a slight punishment, rather than pay the fees upon acquittal, on an indictment for misdemeanour?—Yes; I have heard of it.

89. For some portion of those fees, I believe, you could find no rule of court, and no legal origin whatever?—No; but we found this fact, that, some years ago, many of the fees had been doubled without any authority whatever.

91. Even if the fee had been legal before, do you imagine that it was legal when it was doubled?—No; I imagine that it became legal by prescription. In point of fact, so few of these fees were legalised by legislative enactment, that it was very difficult to find out how they arose; and therefore the question was, what point would you stop at in order to come at a legal fee?

92. They might have originated in extortion, and nothing else? — Yes; I believe, speaking from the inquiries that I made at the time into the fees, that half of them originated in imposition by the officers.

So far as to common law fees; the fees exacted in Chancery are in no better condition.

387. *Mr. Watson*: Then the persons receiving emoluments are as far as you are aware, the accountant general, and some of the officers attached to the judges at equity and in law? — *Mr. Field*: Yes; the chief registrar is one of those who still receives fees to his own use, and who has not, I believe, returned them. He receives a poundage upon any monies paid into his hands to keep as security for costs. If a party appealed a decree, he would have to pay 20*l.* deposit into court, to answer the costs of the appeal if it were adjudged against him. Supposing he were successful, the court would order that money to be returned to him, but the registrar would only return him 19*l.*, keeping back 1*l.* for himself.

388. Do you know any authority for taking that fee? — It is a very old practice; but I should wish the registrar to be asked that question himself.

389. *Mr. B. Escott*: Did you ever dispute it? — No. I have told the registrar that, under the late Act, which prohibited him from taking fees, he ought not to take it; but I suppose he considered that being a brokerage, it was not to be considered as a fee.

390. When you told him that he ought not to take it, did you say that, because, in your opinion, it was an illegal demand? — It was not done in so serious a way as that; it was more in the way of observation. I have not remarked on it with any determination to resist it.

391. If you had been determined to resist it, do you think he could have enforced the payment of it? — I am not prepared to answer that question. It is an ancient fee; and my impression is, that if he takes it, he ought to pay it over to the Suitors' Fee Fund. It is not a large amount per annum; perhaps 200*l.* or 300*l.* a-year.

392. His having the money in his hand of course enabled him to retain it, unless you commenced legal proceedings against him? — Yes; unless I had complained to the Chancellor, which would probably have been my mode of redress.

393. Did you ever complain to the Chancellor? — No; certainly not.

Then comes the case of multiplying fees, in which, certainly, some of the officers of the County Courts have shown themselves as accomplished as if they had been at the trade all their lives. Mr. Hankins says:—

Though it appeared to me, when the Act passed, that the table of fees was perfectly clear, yet they are now multiplying those fees beyond what was ever intended; and they say that the statute will bear them out, and that we have no right to interfere. We have no power at the Treasury to say what is a legal fee, but only of remonstrating with the parties upon the subject; and they say, that the fees that they are demanding are warranted by the table; and they are multiplying the fees to a great extent, so much so, that they will cut up the system if they do not take care.

Again: there seems no little difficulty in ascertaining what the proper fee is. Mr. Johnson, solicitor to the Suitors' Fund, is asked as to this:—

655. A sutor, not learned in the law, but about to institute a suit, could not obtain that information without making search through all the Orders of the Court of Chancery relating to the fees since Lord Hardwicke's time; is that the state of the case?—His solicitor would of course be acquainted with the fees; but he, the sutor, would have some difficulty.

658. Is there any one book in which all the fees are brought into a compendious form in the shape of a table? — No.

659. *Mr. B. Escott*: Do the orders themselves specify the fees minutely and separately? — They do.

660. *Chairman*: Would it not be advisable in the office, taking the Lunacy Office, there should be some table to see if the fee demanded is legal? — Yes.

661. *Sir J. Graham*: *The sutor is altogether dependent on the information he receives from the solicitor; he cannot check the charge of the solicitor?* — You are aware that the solicitor's bill is taxed, and the taxing master would see that the solicitor does not charge fees that he is not entitled to.

662. Amidst this multiplicity of orders relating to fees, is there no contrariety; one order at variance with another as to fees? — No; there are not so many orders affecting fees.

663. From your knowledge of the books, how many should you

say there are? — I do not, at this minute, recollect more than six or seven orders.

664. *Chairman*: Are they very voluminous? — Lord Hardwicke's is; it relates to every office in the Court of Chancery.

665. *Sir J. Graham*: *If the number is not great, would it be a difficult task to form a compendious table? — No.*

666. *Mr. B. Escott*: Do you think it material to have such a table? — I do not think it is material. [Which seems a non sequitur.]

A great deal of evidence has been taken as to the present mode of taking fees by clerks, both at Common Law and Equity, and a very serious case has certainly been made out. It does not appear that any proper check exists as to the receipts and payments of the many clerks employed in different departments of the law, whether at Common Law or Equity. This subject has already been brought before our readers¹; and we are very glad to find that our statements are fully supported by the evidence taken before the Committee.

The Committee called before them, in the first place, Mr. Hankins, the law clerk of the Treasury, and he gave evidence chiefly as to the Common Law clerks:—

124. *Mr. Romilly*: When the clerk of the judge, who remains in town, accounts for the fees which he receives at chambers, have you any means of testing the accuracy of that return? — *Mr. Hankins*: Yes; he enters the fees in his book.

125. Have you any means of testing the accuracy of the entries in the book? — No; I cannot tell how many attorneys come in the course of the day.

126. He might make more or fewer entries in the book, and you might not know it? — He might. Prior to 1830 the judges' clerks used to keep no accounts. Lord Tenterden's clerk kept two bowls, one for gold and another for silver, and he never kept any account of any kind; he told me that all he knew was that he had so much in the morning, and at night so much more, and that that was all profit.

133. All you can do is to ascertain that the return is correctly added up? — Yes; and that the fee is a legal fee; but if they make an entry of having received the fee on ten occasions, I have

¹ 1 L. R. p. 413. on "The Legal Budget."

no means of ascertaining whether they have received it on ten or fifteen occasions.

134. *Sir F. Theisger*: Have you ever considered whether there might be some check established as regards the summonses, and so on? — Yes; I could suggest a means of applying a check, because I would compel them to keep a counterfoil book. We are trying to do that with the County Courts; make them issue their summonses from a book which shall leave something remaining in the book by which the number of summonses may be checked.

Mr. Field then takes up the tale.

371. *Mr. Field*: When a party comes to pay a toll, I do not believe that a wrong toll is ever imposed upon him; that is to say, I do not believe he is ever charged too much. If you asked me whether I think he is ever charged too little, I might express greater doubt.

372. Why should he be charged too little? — Because I should not be at all surprised, if I could get at the bottom of all this matter, to find out that there might, in some cases, be a good understanding between the fee payer and the fee taker, so that the former should pay the fee taker but half the fee that was due, and should put the other half in his pocket and never account for it; but I do not charge anybody with having done so; I only speak of possibilities.

373. In that supposed case the motive would be, that the receiver should put money into his pocket, and the payer also? — Just so; I should not find it out as a solicitor, because I should be properly charged in my accounts by my clerk, if I had a clerk capable of doing such a thing. By the clerk's account for a particular toll I should know that he had been through the toll-bar; and I could not find out what understanding took place between him and the toll-taker as to the way in which they settled that account.

423. *Chairman*: Is not there a great objection to the having of so many fee-takers in the court? — The objection is the great difficulty of check, the greater extent of account, and the waste of the men's time who have to keep the accounts, many of whom are public ministerial officers; who should be devoting their time to drawing up orders, or doing the other work for which they are appointed, and for which they are paid, but whose time is taken up in no small part, by having to keep all those accounts.

424. Can you give the Committee any idea of how many fee-takers there are in the Court of Chancery? — I believe there are

about forty men who swear to the accuracy of the accounts, and pay the money in ; but many of those have others employed under them who certainly often take money on the court account. My impression is, that there are not less than eighty or ninety men who occasionally receive the money, which goes, or should go, into the Suitors' Fee Fund in the Court of Chancery ; but the number of legally authorised takers, I do not think is much more than forty.

427. There is a great deal of money taken as copy money in the Court of Chancery, in your judgment, is that a proper mode of levying fees upon the suitors ? — I think if the suitors are to pay anything at all, it is right they should pay the cost of such copies as are made for their use by the Court functionaries ; but I do not think it is right that the making a copy should be rendered a source of emolument to the officers at all.

430. Has your attention been drawn to the subject of checks upon the collectors of fees ? — I have looked at it.

431. Is there any efficient check upon the collectors of fees ? — Certainly not ; no check whatever, except so far as the affidavit of the forty out of the ninety (if those are the numbers) may be called a check.

432. If a person be inclined to be dishonest, the next step is not a very difficult one ? — No. And it is a very unfortunate thing that gentlemen who ought particularly to command the respect of those about them, and above all things to be so placed as that there should be no possible suspicion attaching to them, should be forced by this scheme to be in the discharge of a steward's duty in the receipt of fees, which must, more or less, render them open to suspicion, or liable to have suspicions cast upon them, of retaining money for their use ; there are no doubt continual rumours about among the practitioners of the court, pointing at one person or another, and saying they cannot but think he has his finger in the Fee Fund.

433. Suspicions have gone abroad that all the money has not been honestly dealt with ? — They not only have gone abroad, but the whole system, if they were ever so honest, is to place men in a position in which it is impossible that any such suspicions can be answered by them, because there is no check upon them, and therefore no evidence they can appeal to to show the integrity of their doings.

441. Do I understand you that there are a great many warrants issued which are never attended to, for which fees are levied ? —

I will put the case of a reference for the marriage of a ward of court, or anything else which was wanted to be done in a good deal of haste. I should go to the Master with my order and all my papers prepared as far as I could; I should tell him the wedding was to take place in a few days, and I should beg him to stop half an hour after his regular time and go through the papers with me; he would settle a proper scheme of settlement and look into the matter, and would come to his decision, perhaps, without my having taken out any warrant at all. After the business was done, a report, approving of the marriage, would be drawn up; the Master's clerk would look over the different documents, and the length of the scheme for the settlement, and the length of any statement of the infant's fortune; and he would say, — This, in the ordinary course of business, would have taken so many warrants to go through, at the rate of about thirty folios to a warrant; and he would then charge me and make me take out the number of warrants which would, if the Master had not gone out of his ordinary course, have been required to have gone through the business; he does that in order that the fee fund may not lose by the Master having afforded me the facility of going through the matter in the way he did.

478. *Chairman*: Will you state to the Committee what, in your opinion, would be the proper checks to establish with respect to those fees? — I am inclined to think the best check, so far as there are monies to be received through the offices of the court, would be the Irish plan of a law stamp, established by the 1 & 2 Geo. 4. c. 112.: next to that, I think there should be some receivership of fees; but I think it would be very wrong to allow the different officers to have anything to do but to discharge the judicial or ministerial duties for which they are appointed; they should receive their salaries and know nothing else about money whatever.

497. Do you of your own knowledge know the practice of various fee-takers, whether they have established any check? — By check, I presume, is meant some check on behalf of the court or the public against the particular fee-taker, and not by the particular fee-taker upon his own clerk. Each master's head-clerk or under-clerk pays in monthly a considerable sum of money, £1000 for instance; as to the accuracy of that accounting there exists against the payer no check whatever.

511. Then, in point of fact, it is rather that you do not know that there is any check, than that you can affirm that there is not?

— I am confident that, in the nature of things, there can be no efficient check to satisfy the public against any of their entries; the best of them might be robbed. I do not think there is a better man of figures, or any who would keep his accounts better than Mr. Cartledge; but he admitted that a copy might be made unknown to him; and the same applies to all the offices. I have a very strong belief that such things might take place. *The Law Courts are as much a branch of the public service as the Customs or Excise; but such a state of things as the Courts present, would never be tolerated there for a day.*

Mr. Johnson, solicitor to the Suitors' Fund, was next examined on this point.

631. Do you know if there is any officer who checks the amount paid in; first of all, is there any check whatever on the receiver of fees in the Masters' office to ascertain the amount they receive? — *Mr. Johnson:* None whatever, beyond they are compelled to swear they pay in all they receive; and the particulars of the amount they receive is entered in the office book.

632. They pay in all they receive, and enter in a book all they have received? — Yes, they ought to do so.

633. Is there any check to show he has paid everything he has received? — No.

634. According to that, is there any opportunity, if the officer is inclined to be dishonest, to receive fees without paying them over? — Certainly, if he will take the risk of being found out.

635. Who is there to investigate the fraud of an officer; who is it possible can do it? the stationer, for instance,—you take out several warrants to-day, and pay to the officer, and supposing he does not enter that, or pay it over to the accountant-general, who is there interested sufficiently in it to find out that he is dishonest? — There is no one, generally.

639. In investigating any matter of this kind, have some suspicions arisen in the Court of Chancery that there has been some unfair dealing with the fees? — Yes; it has been some time under the consideration of the judges to introduce some check to prevent it.

641. In your judgment, a receiver of fees would be the most efficient mode of checking the officer in the receipt of the appropriation of the fees? — Yes, if carried out on a proper plan.

Approaching close to the root of the evil, the Committee then examined Mr. Pugh, clerk to Sir Giffin Wilson, late

one of the Masters in Chancery. He gives evidence on another point; the charging copy-money when no copy is in fact made.

1224. *Chairman*: Does it not frequently happen, when a solicitor is employed on both sides, that although the copying money is charged, the copy is not made? — *Mr. Pugh*: I would rather that the junior clerk should answer that.

1225. *Mr. Romilly*: Have you any doubt of the fact? — I am afraid that practice does prevail; it is not entirely laid aside in every office.

1231. In point of fact, this is something in the shape of expedition money, is not it? — No, not in the nature of expedition money, because the copying clerk cannot in any way expedite the drawing of the report, which is drawn and prepared by me; he does nothing beyond the mere copying.

1232. What is the motive for doing it? — It relieves the clerk from the expense of making the copy; it is a kindness on the part of the solicitor.

1233. Can you say what motive the solicitor has for doing it? — To oblige the clerk: I know no other motive.

1234. Then, probably, the clerk must oblige him in some mode, in return? — Some clerks are more popular than others.

1238. Is there any check upon the amount of fees that he receives? — None that I am aware of further than this, that collecting together all the business done, the business done would represent certain fees; and, therefore, if any body were carefully to go through all the business done, knowing that a certain quantity of business done would necessarily carry with it certain fees, he would see whether those fees were brought out. But that would be a process very difficult.

1242. Here is a return, for instance, of Mr. Stokes, in which it appears that, during this year, there was received 3580*l*. Of course, without intending to make any imputation upon Mr. Stokes, he might have received one-half more for aught anybody knows? — For aught anybody knows. There is the oath that the clerk is under.

1271. Is there any difference in the amount of fees paid in different offices in the Masters' office? — Very great indeed; I never could understand how that is.

1272. Are you aware whether there is any great difference in the amount of business done in the different offices? — That we

cannot make out: the number of reports appears to be pretty much the same.

1358. It appears that in Master Farrer's office, between the 20th of November, 1841, and the 14th of November, 1842, the amount of fees received was 2402*l.*; and that in the following year, between the same periods, the amount of fees paid into the fee fund was 4035*l.*; and that it exceeded 4000*l.* in each of the three following years, while in the previous year it was only 2112*l.* Did that alteration take place upon the death of one of the junior clerks?—Yes; I have heard it spoken of so often and so much, that the impression upon my mind is, that it was so; and I have seen it the subject of observations in print.

Mr. Pugh is followed by Mr. Edwards, clerk to Master Wingfield.

1415. Have you any check of any kind to test the accuracy of the junior clerk?—*Mr. Edwards*: None whatever; nor does any, in fact, exist. It is nearly ten years since I bestowed a great deal of attention on the mode in which the fees in the Court of Chancery were collected; at that time I prepared an outline of a scheme, which I submitted to the Master of the Rolls, for the purpose of improving the mode of collection.

1420. Might not you unite all those fees into the fees for office copies?—So I propose to do. The fees on reports would be paid as the report was given out, in one lump together. The system, at present, I do consider most miserably defective; it is not in any possible way a check; it does not insure that fees which ought to be paid shall be paid; it does not guard against negligence; and it does not offer the slightest protection against fraud.

1433. *Chairman*: Do not you think it exceedingly unfair towards persons in the situation of the junior clerks to leave them in the receipt of fees under the present circumstances of temptation?—I think it extremely unfair that they should be exposed to temptation without the possibility of detection. I consider that the court is morally responsible for every dishonesty that is committed.

Some of the best evidence on these points is given by Mr. M'Leod, of the house of Williams and M'Leod. He clears up the doubt as to the reason of taking office copies, when, in fact, the copies are not made.

1499. *Chairman*: For instance, in those warrants, supposing

you were to take out a number of warrants, is there any check in the world by which to ascertain whether the clerk had accounted for the whole of the monies received upon those warrants? — *Mr. M'Leod*: Not that I know of, and I have reason to believe that instances have occurred where they have not been accounted for.

1517. Have you ever had reason to suppose, in the course of your practice, that warrants have been taken out and not accounted for? — Yes; I have had occasion to prove it.

1546. Was it compulsory upon you to take copies? — No; the Act of Parliament relieves us from that; but hints are given to us that unless we take them the business will go over the long vacation, and that would have been a sacrifice to the client of a larger sum than that.

1547. Then, in order to prevent obstacles being thrown in your way in the Master's office, you paid for those unnecessary copies, which was an advantage, in fact, to your client? — It was so.

1548. *Mr. Romilly*: In fact, it is a mode of extorting unnecessary fees? — I consider it so.

1549. *Mr. Walpole*: If you had waited through the long vacation, the greater part of that bill need not have been charged? — None of it for the copies; but then the client would have lost more money in the shape of interest upon debts.

1557. *Mr. S. Wortley*: Is it in the power of the clerks, then, to throw impediments in the way? — Oh dear, yes.

1574. *Chairman*: When did this case occur about the 13s., of which you refused to pay more than 10s.? — It arose in this way: the officer used to collect those fees. The bag-bearer of the court used to go round to all the solicitors with a list of the petitions in which the solicitors were concerned, and he used to take 13s. That we did not object to, because he had some trouble in keeping the list and coming round to us. The Chancellor gave a direction that in future those fees should be paid at the office of his secretary by the solicitors. I said, "If I am to come to you to pay the fee, I will pay the proper fee and no more."

Mr. M'Leod afterwards makes the following statement: —

I have a further statement to make. I referred, upon the former occasion, to the over-counting of folios by the Master's clerk, but I think I am bound to state to the Committee the effect of that. The evil does not rest with the Master's clerk; it extends in this way: when the Master over-counts folios, the suitor suffers three times by it. He suffers, first, by the Master's clerk; secondly, by the Fee Fund; and, thirdly, by the solicitor. The Master's clerk, of

course, profits by the over-counting; the fee fund profits by the over-counting, as a proportion of the fee goes to the fee fund; and the solicitor profits in this way: the taxing officer, in taxing costs, allows the solicitor at the same rate as the Master computes the folios; therefore, in that way, the solicitor profits by the over-counting of the Master's clerk. I thought that I was bound to state the extent of the evil.

1926. *Mr. Christie*: Is this over-counting habitual?—It is very general. I hold in my hand papers, a mere glance at which, without computing, would show the Committee that they are over-counted. Here is one document which you will have the kindness to look at; the Master estimates it at 1080 words; he has marked it so upon the back; folios 12; there are 90 words to the folio; you will see "fo. 12." written on the back, that is, 12 times 90.

1927. To what extent was that over-counted?—I should say, certainly, the affidavit was not more than four folios.

1928. And it is counted twelve?—It is counted twelve.

And what follows is still more important.

2069. Will you have the kindness to look at the analysis of the bill. The amount with which you stated you were charged was 804*l.*; this is 741*l.*, I think?—I will state how this arises. The Master's clerk explained it to me this morning. Knowing the clerk, I should say he had fallen into a mistake. I do not desire to put it higher than that at all; but he sent to me yesterday morning to say that he had charged 60*l.* too much in my bill.

2070. You have the bill yourself where 800*l.* is charged?—Yes; and that accounts for the difference. He has paid me the money, and I think it was a mistake.

2071. He has paid you back 60*l.*?—Yes.

2072. *Mr. Christie*: He paid it you yesterday?—He paid it me this morning.

Mr. Burningham, junior clerk to Master Brougham, gives his evidence with some *naïveté*. He was necessary to complete the group.

1749. Does not it often happen near the long vacation, that there are suits in court where there are copies charged for, and copies never made?—*Mr. Burningham*.—Yes; copies supplied in bills of costs. When they come to tax them, they come and say, "Give me a back sheet," or "make me out a bill for certain copies."

1750. Can you give any reason why the persons should allow

copies to be charged for when they are not actually made? — *The remuneration of the office ; it is the fees ; it is thought that it is right and proper that they should be paid to the office. Of course I come into a share with the others.*

1777. If he (a clerk) were intentionally dishonest, might he not avoid making the entry in the book? — But then the voucher might be produced, and the person might be called upon to account for it.

1778. Might not he avoid entering it in the book? — There might be such an omission. I think it might possibly occur.

1779. *Mr. B. Escott*: If he did, might not he pocket the fee for his own use? — If it was not entered in the book, and it was not brought to account, he might; I think it would certainly be pocketed in such a case.

1781. Do you think that the solicitors ever pay this money in order to get their business accelerated in the Master's office? — No, I think not.

1782. You think that cannot be the motive? — No.

1783. Can you give me any motive why a man should pay money if the thing is not done? — No; it is a thing that he does not want; he has no occasion for it; he says, "I have no use for it; I do not want it." It is always implied, that if he wants it at any time he can have it supplied.

1787. Although you say there is a possibility of pocketing the fee without entering it in the book, do you give it as your opinion, that that practice is never adopted? — I have never heard of it. *I have heard it complained of; they have sometimes said it, but it has never been proved.*

1788. Do you disbelieve it? — I have not known a case.

1789. Just consider my question: I ask you whether you disbelieve it? — No; I cannot say. I think such a thing might possibly happen as an omission of that kind; *not frequently.*

1790. Do not you think, according to your knowledge of human nature, that it is rather a dangerous temptation? — *No doubt there is a temptation.*

1791. *Chairman*: Supposing you are unwell, or away from the office from any cause whatever during the day, or for any other period of time, who receives the fees for you then? — *My son.* The fact is, I have had a succession of sons. I have one there now who is twenty-four, who has been with me from his childhood; and if I am absent for a day, or whatever the time may be, he has a private book, and he enters whatever he receives, and I afterwards enter it in the office book.

1792. *Mr. Romilly: He does not join in any affidavit? — No.*

1793. And that is so with all the masters' clerks; they must necessarily be absent occasionally? — I think so.

Our readers will probably agree with us, that a sufficient case has been made out on this head of the inquiry, to justify some effectual steps being taken to remedy the evils here known to exist.

The questions of paying fees according to the value of the matter in dispute, and of the relative merits of payment by fees or by salaries, are thus broached by Mr. Watson. Mr. Hankins is asked —

164. Have you ever considered that a uniform fee upon all suitors, a poll tax upon all; that is, whether a man is suing for 500*l.* or 5*s.*, he is paying the same fee? — Yes, he does so in the superior courts; but in the smaller courts there is a scale of fees according to the amount sued for; and I think it should be so in the superior courts; that when a man sues for a small sum, he should not be charged the same fee as a man suing for a large sum.

166. Is there not, on the other hand, this objection, that when business is paid for by salary, it is not so carefully and so well done? — I think that would cure itself. I do not see why officers in courts of law should not be made to do their duty in the same way as I am at the Treasury; I know that if I neglected any part of my duty I should be suspended or dismissed, and I would say, apply the same principle to officers of courts of law. Owing to this fee system, they have got into a lax way; but hold over their heads the fear of being suspended or dismissed if they do not do their duty, and I think it will have the desired effect. I have been in public departments all my life; I have served in the Customs and the Treasury, and I never suffer anything to go undone, or the public unserved. I feel as much interest in the proper performance of my duty as I should do if I were paid by fees, and much more so; because I think it is inexpedient to pay any of the public officers — for instance, the judges of the county courts — by fees. I hear that the new system of county courts has answered very well; it gives great satisfaction to all suitors; but the only thing that they cry out against is, that the judicial character should be paid by fees, taken even across the table where the case is decided, and I think that an alteration must be made.

169. Is it not very desirable to make them accountable as well as the others?—Yes; I believe many of them are getting 1200*l.* a year at this moment. Mr. Waters, who was Lord Tenterden's clerk, told me that he made 3000*l.* a year sometimes by fees.

173. *Mr. Romilly*: You are also of opinion that you might assess the fees upon the amount sued for; and you think that the fees might be paid through the Stamp Office?—Yes; that is the case in Ireland now, by means of stamps. If a party goes in to deliver a pleading, he delivers it upon a 4*d.* or 6*d.* stamp. If he goes to make a search, he delivers in a paper with a stamp upon it, and that is retained by the officers, and is a check against the receipt of the money.

Then the Committee took another turn. Mr. Hankins had been showing how many useless forms, for the purpose of taking these fees, are pursued; Mr. Escott naturally asked—

184. Would not the abolition of such useless forms tend very much to the simplification of the proceedings in the courts of justice?—I think it would.

185. *Mr. Ewart*: What is the use of the Chancellor of the Exchequer's seal?—None whatever.

186. Does he seal it himself?—No; it is done by Mr. Ad-derley.

189. *Mr. Ewart*: Why does the Chancellor of the Exchequer object to an alteration?—There is a gentleman who is his secretary, and has been secretary to Chancellors of the Exchequer for some time; we must let matters remain as they are during his lifetime, and then, very likely, we can alter it. To show the absurdity of these things, I may state that the sealing fees upon Exchequer writs come into the Treasury to pay the Treasury salaries; that sealing fee used to go into the Chancellor of the Exchequer's pocket, and various fees. Now, since he has a fixed income, those fees are made payable into the public fund; and as he is a Treasury officer, he pays his surplus fees into the Treasury, and it goes to pay my salary, and the salary of other officers, and they have to ask Parliament for a grant to make up the deficiency.

Mr. Cartledge, the secretary of lunatics, thus speaks as to fees in lunacy:—

208. The income of lunatics, I suppose, varies very much?—*Mr. Cartledge*: Very much. I have a return here, which was called for some time ago, which will show you the precise amount

of incomes classed, from 100*l.* to 1000*l.* and upwards. There are some incomes that amount to 10,000*l.* a-year, and some incomes that are as low as 30*l.* a-year.

209. To lunatics who have property of 10,000*l.* a-year, the scale of fees is precisely the same as in the case of lunatics who have only 100*l.* a-year?—Precisely so.

We are fast coming to an *ad valorem* mode of remuneration.

We reserve for separate consideration the important evidence of Lord Langdale on the subject of fees, and shall conclude with the recommendations of the Committee on the points in the evidence that we have brought before our readers.

1. That all officers of the Court of Chancery ought to be paid by salary.

2. That to supply the stimulus to exertion arising from remuneration by fees, the due and efficient performance of the duties of the officers ought to be secured by supervision, by the responsibility of the superior, by advancement for merit, and by removal for misconduct.

3. That for the purpose of securing proper supervision, the establishment of a supervisor is necessary.

4. That the subordinates in each office should be under the control of the superiors, who should be responsible for the due performance of their duties.

5. That each person in the office should be advanced to the higher grades by the Lord Chancellor according to his merit; and that, in order to enable him to judge thereof, regular annual reports should be made by the supervisor to the Lord Chancellor.

6. That all persons should be liable to be removed in every office for misconduct or for permanent inability to perform the duties thereof—the superior of the office by the Lord Chancellor and Master of the Rolls, the inferior by the Lord Chancellor alone—on proof of such misconduct, or of such permanent disability.

7. That each officer should receive a retiring pension for permanent disability after a stated period of service; or without permanent disability, after a further period of service.

8. That the fees taken should be carried into one fund, and applied in the most efficient and economical manner in promoting the interests of the suitors; that is, the support of such officers as are not paid out of the Consolidated Fund.

9. That in taking of fees, the following things are to be provided for :—

1. That no more is levied than is absolutely required for the purpose for which fees are imposed.

2. That all fees imposed shall be actually levied.

3. That the whole amount levied is applied for the purposes for which the fees are levied.

10. To promote the first object it is important to consolidate offices as much as possible, and to discontinue useless offices and forms of proceeding.

11. To promote the second object, it is essential to provide a test of payment, so that no person should be able to escape the payment of the fees imposed.

12. To promote the third object, it is essential to provide a check, whereby the total amount levied may be paid into the fee fund.

13. To promote all three objects, it is essential that fees should be consolidated, so as to be made as few in number as possible.

14. That the fees should be levied with as little inconvenience to the suitor as possible, and should, as nearly as may be, represent the amount of benefit derived by him.

ART. VI.—REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

ECCLESIASTICAL COMMITTEE.

THE following reference was made to the Committee :—

To consider and report upon the Law of Divorce.

REPORT.

Assuming that divorce *a vinculo matrimonii* ought in cases of adultery to be granted by a court of justice, and not by the legislature, your Committee have considered whether this remedy should be allowed to the *wife* as well as to the *husband*.

The practice of the House of Lords is against the wife;

for if she have no other charge against her husband than adultery, her bill of divorce will be rejected.

In so ruling the Lords appear to hold that the injury which a wife sustains from her husband's infidelities, is comparatively trivial, or at all events is not irreparable. The wife, it is said, may and ought to forgive an unfaithful husband; but no husband can forgive an unfaithful wife.

Where, besides adultery, the husband was guilty of incest with his wife's sister, parliament relieved the wife; because such incest, according to the law of the Church, precluded her from further cohabitation with him.¹ Such was the case of Mrs. Addison in 1801. The like circumstances procured similar redress for Mrs. Turton in 1831.

Where, besides adultery, the husband had committed bigamy, and was transported for that offence—where his conduct in other respects showed a great degree of profligacy, the legislature thought proper to pass the wife's bill. This was the case of Mrs. Battersby in 1840.

According to these three precedents, the husband must be guilty of some other enormity, besides adultery, before the wife's bill against him can succeed.

Such is the practice of parliament. But it may be doubted whether the tendency of public sentiment is not favourable to the wife's claim to be released from her fetters wherever the husband is convicted of adultery alone, if accompanied by circumstances which show a strong improbability that the wife by any effort on her part can reclaim him; wherever, in short, the adultery is so flagrant and persevering as to make it reasonably impossible for her to continue cohabitation with him. In such a case your Committee think it might be well to grant divorce *a vinculo* to the wife.

Your Committee do not think that it would be proper, as a general rule, to grant divorce to the wife as readily as to the husband. Some distinction ought to be drawn; but what that distinction should be, it is difficult to determine.

¹ In fact, the wife, by continuing cohabitation with her husband after discovering his delinquency, would, in such a case, be herself guilty of incest. (See Lord Thurlow's speech in support of Mrs. Addison, 35 Parl. Hist. 1429; Macqueen's House of Lords, 477.)

Another question is, Whether the sentence of divorce *a vinculo* ought to enable *both* parties, the guilty as well as the innocent, to marry again?

The thing chiefly to be dreaded in suits for divorce, is collusion. Now, it certainly would seem, that the most effectual preventive of collusion would be to confine the benefit of the sentence to the party complaining of the injury.

On the other hand, to interdict the guilty party from marrying at all until after the death of the injured party, would not always be attended with good effects; for this, in many instances, would insure a continuance of the adultery, involving bastardy on the innocent and helpless offspring.

The question then is, Whether it is better to avert the danger of collusion, by confining the remedy of divorce *a vinculo* to the injured party; or to prevent the continuance of adultery, by permitting the delinquent to make amends to social order by entering at once into a second marriage?

In considering this question your Committee have to observe, that as the sentence of divorce *a vinculo* will extinguish the marriage and put an end to the relation of husband and wife, it would seem to be a logical consequence that *both* parties should immediately have liberty to marry again.

It may also admit of doubt whether it is solely as matter of favour and indulgence to the injured party, that divorce *a vinculo* ought always to be granted. Some may think that even where both parties are guilty of adultery there is, on that very account, the more reason for severing them; since by their mutual misconduct, the marriage state is brought doubly into disgrace. And it scarcely appears reasonable that the infidelity of *one* of the parties should be a sufficient ground for divorce, while the infidelity of *both* should secure the continuance of the matrimonial connection. Perhaps, therefore, it would be better to treat the case as one of public order and decency; and this seems to be the disposition of the Courts in Scotland, where the plea of recrimination is considered no defence to a suit of divorce for adultery.¹

¹ Erskine's Institute, p. 152. Lord Ivory's Edition.

On the whole, therefore, your Committee are not disposed to recommend that the liberty to marry again should be confined to the injured party.

It is now fitting that we should say a few words on the subject of the plans which have been suggested to remedy the evils of the existing system of divorce *a vinculo*, for we apprehend the rational part of mankind are of opinion that those evils ought not much longer to be endured. There seems to be an approximation to agreement on the following points: —

1st. The absolute necessity of a surrender by parliament of its existing jurisdiction. To this we believe the majority of the prelates have at last assented. The scruples of the Episcopal Bench, always formidable impediments, have, therefore, been got over.

In the second place, we think all are pretty nearly agreed, that the action at law and sentence ecclesiastical need no longer to be considered indispensable preliminaries to divorce *a vinculo*. If the jurisdiction to dissolve marriages be entrusted to a Court competent wisely to exercise it, why should parties be compelled to go through a useless prefatory ordeal? Why clog the administration of justice with unnecessary expense, delay, exposure, and humiliation?

Holding, then, that there is at least an approach to unanimity on these two points, the question remains, and it is one of some difficulty, To what tribunal ought this important, critical, and delicate jurisdiction to be committed?

Some propose the Ecclesiastical Courts of London, some the Court of Chancery, and others the Judicial Committee of the Privy Council.

Now, as to the first proposition, the transfer of this authority to the Ecclesiastical Courts: nothing, we apprehend, would argue a greater blindness to the lessons of experience, than to entrust to tribunals whose maxims belong to the dark ages, a jurisdiction such as this of divorce *a vinculo*, which ought especially to be exercised in a spirit of liberal, yet cautious, attention to the altered constitution, feelings, and habits of modern society. The marriage law followed in the Ecclesiastical Courts is extracted from the

opinions of the Ancient Fathers, the decrees of General Councils, and the epistles and bulls of the Roman Pontiff; how far adapted to the wants of an enlightened Protestant community in the meridian of the nineteenth century, those best can estimate who have looked into the impure and obscene commentary of Sanchez.

Further more, the rules of evidence in these Courts are peculiar, and in some material respects contrary to the law of the land. Thus the testimony of a single witness is never admitted as proof of any fact.

Now cases of adultery are of all others the very cases in which a *penuria testium* is most likely to occur. To insist on having two witnesses where the circumstances are almost necessarily secret, is generally to insure a denial of justice. In certain cases even more than two are required by the Ecclesiastical Law. Then, as to the mode of *taking* evidence, it is wholly by means of paper depositions. There is no *viva voce* examination. And, independently of other objections which might be stated, your Committee would remark, that there are many reasons which, at the present crisis, render it peculiarly inexpedient to extend the regions of ecclesiastical jurisdiction.

The principal recommendations of the Court of Chancery are the gravity, caution, and circumspection which distinguish its proceedings. It has, moreover, the power on all necessary occasions, of calling in the aid of the common law tribunals. Divorce *a vinculo* is granted by the Chancery in America; and it appears that in former times the Chancery of this country granted divorces *a mensa et thoro*.¹ But, unhappily, it must be owned that nothing can be worse than the method adopted by this high court, of examining witnesses. It would, moreover, be repugnant to the principles of our law to require an answer to be put in to a criminal accusation upon oath.

This, therefore, brings us to consider the pretensions of the Judicial Committee of the Privy Council. The highest legal authorities compose it: the Masters of Equity, the oracles of

¹ Macqueen on the Rights and Liabilities of Husband and Wife, p. 205.

law, the heads of the Ecclesiastical Courts, and some even of the reverend prelates themselves, are there assembled. The course of proceeding, too, is governed by the principles and maxims of the law of the land. The rules of evidence are the same as those of the Queen's other Courts; and when witnesses are examined, the examination is *viva voce*. The Judicial Committee, moreover, has power to direct issues for trial at law, as in the Court of Chancery; and we apprehend the remedy of divorce *a vinculo* might well be granted upon petition and answer: that is to say, upon petition to the Crown, which would be followed by an order of reference to the Judicial Committee, requiring the defendant to put in an answer, *but not upon oath*. In this way a record would be prepared, and the proofs on either side would be restricted to the allegations. Another recommendation of the Judicial Committee is, that it possesses a *foreign* as well as a *domestic* jurisdiction. It is moreover a *forum commune* — an open court; so that all members of the profession may practise before it — an advantage of unspeakable importance to litigants.

Your Committee on these grounds are of opinion that the jurisdiction of divorce *a vinculo* may very beneficially be entrusted to the Judicial Committee of Her Majesty's Privy Council.

Your Committee have not thought it expedient to disturb the existing jurisdiction of the Ecclesiastical Courts in causes matrimonial; and, supposing the views of your Committee to be adopted, these Courts would still continue to take cognisance of suits for the restitution of conjugal rights, suits of jactitation, suits for nullifying marriages, and suits for divorce *a mensa et thoro*.

It may be said that the two jurisdictions would occasionally clash and interfere with each other. The only answer that your Committee deem it necessary to make to this objection is that it is one, not of principle, but of detail; and that it may easily be obviated by a clause adapted for the purpose, to be inserted in any Bill that may be introduced upon the subject.

COMMON LAW COMMITTEE.

THE following reference was made to the Committee : —

“ To consider whether parties to the record, both at Law and in Equity, should not be competent witnesses in their own favour, and liable to compulsory examination at the instance of their opponents.”

REPORT.

Your Committee have considered the above reference, and beg to answer in the affirmative the questions involved therein. When a matter is submitted to the decision of any persons, be they judges or jurors, it is obviously of the last importance that those persons should be made acquainted with the real circumstances of the case before them ; and it is equally obvious that the real circumstances are usually best known, and are often only known, to the litigating parties themselves. If then, the parties to the record were as willing as they are able to narrate events as they really happened, they would of course be the best witnesses that could be produced ; but inasmuch as they are often deeply interested in the result of the cause, and are consequently exposed to the temptation of colouring or misstating the facts, it has been hitherto supposed, at least at common law, that their testimony could not be received without endangering the best interests of morality, and embarrassing the investigation of truth. In other words, the admissibility of the testimony of parties has been objected to on the twofold ground that it is calculated to increase the crime of perjury, and to mislead the Court or jury.

Let us consider these objections in their order ; and first, as to the temptation to commit perjury. The importance of this objection appears to your Committee to be greatly overrated. So long as parties, like other witnesses, are liable to a rigid cross-examination, it matters comparatively little what amount of interest they may have in withholding or perverting the truth. The dread of detection and of consequent punishment, even in the absence of every moral sentiment, will in the great majority of instances check the commission of perjury.

The *party* knows that his testimony will be sifted with more than ordinary care, and this knowledge must have a tendency to restrain any inclination to falsehood. This very objection, be it remembered, was urged most loudly when Lord Denman brought in his bill to admit the testimony of interested witnesses. It did not then prevail, but the bill became the law of the land, and the practical working of that great measure has since amply demonstrated the invalidity of the reasoning on which the objection rests. Besides, if the admitting parties to be witnesses would sometimes occasion perjury, it cannot be doubted but that at other times its effect would be to prevent the commission of that crime. For, who that practises in courts of law but must acknowledge, that one of the most frequent and dangerous forms of perjury is that which affects to narrate the admissions of one or other of the parties to the record? A witness for the plaintiff, for instance, distinctly swears that he called upon the defendant on a certain occasion, and that the defendant then acknowledged the justice of the plaintiff's demand. The scene is laid where no third person was present; the defendant cannot himself be called to contradict the statement of the witness. The interview has perhaps taken place to the knowledge of the defendant's servant, and the servant to this extent corroborates the testimony of the witness. Cross-examination is obviously ineffectual. The witness tells his story in a calm and plausible and connected manner; he is believed, and the defendant unjustly loses the verdict. Now, if in such a case, and there are many such, the defendant were capable of himself giving testimony, not only would the jury be better enabled, by contrasting the manner of the two witnesses and the probability of their opposite statements, to form a correct decision, but the false witness would hesitate much before he would tell a tale which he knew full well would be flatly contradicted; and even if he did venture to enter the box, the mere knowledge of the fact that he was uttering falsehoods, and that another witness could and would be called to make an opposite statement, would often have the effect of rendering his story incoherent and his manner suspicious, and would thus prevent any credit from being given to his testimony.

On the whole, therefore, your Committee consider that the crime of perjury would not to any serious, if indeed to any, extent be increased by a law which should render parties to the record competent witnesses. But even if they have come to an erroneous conclusion on this head, and if the crime of perjury would in point of fact be increased by such a law, they are by no means prepared to condemn its introduction on that ground alone. The folding of sheep by night on lands at a distance from the homestead, no doubt affords facilities for sheep-stealing; the exposure of goods in front of shops leads to larceny; nocturnal travelling may tempt to the commission of highway robbery; but no one thinks of prohibiting these innocent acts on the ground that they hold out temptations to crime. Why is this? Because the inconveniences that would result from such a prohibition would be felt far more by the public than those engendered by a partial increase in the number of offences. So, in the case under discussion, your Committee consider that the advantages derivable to the cause of truth from the examination of persons best conversant with the facts, would far more than counter-balance any evils which the cause of morality would be likely to sustain, from the crime of perjury becoming somewhat more frequent. In all cases of this kind, the legislature must be content to decide on a balance of evils; for even the best human measures are not exempt from some inconveniences.

But, secondly, it is urged that the testimony of parties should be withheld, because it is calculated to mislead the Court and the jury. This objection your Committee think entitled even to less consideration than the one already discussed; for, in the first place, they consider, as already intimated, that, as a general rule, parties would be found to tell the substantial truth; and next, they entertain no doubt, but that as, where parties are made witnesses, the motive to deceive is at least as apparent as it is strong, the Court and the jury would naturally sift with proportionate suspicion the testimony of such persons, and, being on their guard, would refrain from giving implicit credit to statements, which, coming from a less suspicious quarter, would demand unhesitating belief.¹ Besides, the very circumstance of the

¹ See Taylor on Evidence, § 953.

parties themselves being examined would not unfrequently prevent the jury from being misled; for their examination would afford an opportunity, which is at present often wanted, of ascertaining the motives, characters, and interests of the witnesses called on their respective behalves, and might thus furnish a clew whereby to determine the relative amounts of credit due to such witnesses.

Your Committee, having now answered the two main objections to the plan proposed, beg leave to call the attention of the Society to those cases in which the law at present allows parties to be examined. For instance, at our Police Courts, in Courts-martial, in the new County Courts, and in most of the summary proceedings before magistrates, parties are allowed to tell their own tales, and not only is no inconvenience felt from the prevalence of this practice, but it is unquestionably productive of great advantage. Your Committee have sought for information on this subject from several of the Judges and officers of the County Courts, and the almost uniform answer to their inquiries has been that the system of examining the parties themselves has in those Courts worked extremely well. So also in criminal prosecutions, which, though nominally instituted in the name of the Crown, and having for their declared object the satisfaction of public justice, are in fact carried on at the instance of the injured party, who, in some cases, is even entitled to the restitution of his property on conviction of the offender, — the prosecutor has ever been admitted as a competent witness; and there is no pretence for asserting that the fountains of justice have been defiled by the contaminating influence of such testimony. In the Irish Civil Bill Courts parties may be compelled to testify as witnesses for their opponents; and a clause enabling arbitrators to examine at their discretion the litigating parties, is now inserted almost as a matter of course in all orders of reference. Again, in the Superior Courts of law, affidavits sworn by either party, may in general be read in support of, or in opposition to, any *interlocutory* motion; and in Equity, not only is the sworn answer of the defendant admitted as evidence against him in all cases, and for him in some, but however deeply he may be interested in the question involved

in the cause, he may, in almost every instance, by the express provision of Lord Denman's Act, be examined as a witness on behalf of the plaintiff or of any co-defendant. Moreover, a clause is now uniformly introduced in the order of reference to the Master, enabling him to examine both parties on interrogatories.

In considering these exceptions to the general rule which rejects the testimony of parties, one is naturally inclined to ask, how is it possible to reconcile the law with the exceptions; or, in other words, how can both, at one and the same time, be founded on principles of justice and expediency?

If it be right and advisable that parties to the record should be admissible witnesses in the County Courts, on what ground can their testimony be rejected at *Nisi Prius*? If the law be sound which enables plaintiffs in equity to appeal to the oaths of defendants, why should not plaintiffs at law have the same powers; and why should not defendants either at law or in equity be authorised to examine their adversaries as witnesses? These questions are far easier asked than answered. Indeed, your committee are of opinion that they do not admit of a satisfactory answer. In practice, nothing can exceed the absurdity and injustice occasioned by the above anomalous state of the law. An action is brought at common law, and the defendant feels that he has no defence unless he can examine the plaintiff on his oath. This he is not allowed to do; and, therefore, if he be a poor man, his case is hopeless. But if he be sufficiently wealthy to bear the costs of a bill in equity, the result may be very different, for what cannot be effected by direct means may be indirectly obtained; and the plaintiff, albeit an inadmissible witness at common law, may be made a defendant to a suit for discovery; and by this cumbrous and costly process, his action may be defeated by his own testimony. Thus the fate of the action will depend on the length of the defendant's purse. Again, a suit is instituted in Chancery, and the defendant, though himself compellable to put in his answer on oath, has no direct means of examining the plaintiff; but his sole remedy, unless the writ be one which admits of a reference to the Master, is to institute, in his turn, proceedings against his opponent, or, in the

language of the law, to file a cross-bill. In the one case the merits of the cause cannot be determined rightly without having recourse to two courts; in the other without having recourse to two suits in the same court. Surely these instances of gross defects in the law require no further comment.

Your Committee, therefore, beg merely to convey to the Society their decided opinion, that the time has now arrived when it has become expedient to enact, that, excepting in the case of actions for criminal conversation, which, for obvious reasons, should be excluded from any general rule, all parties to the record, whether at law or in equity, should be competent witnesses in their own favour, and be liable to compulsory examination at the instance of their opponents.

ART. VII. — THE CLOTURE REMEDY.

WE have very often had our attention directed to the state of the business in Parliament towards the close of each succeeding session. This opens to our view another subject — the capacity of that illustrious body for performing its legislative functions: and as the amendment of the law depends entirely upon these functions being well performed, we are thus unavoidably led to consider the greatest practical question of the day — how far the Parliament, as at present constituted, is fitted to discharge the duties cast upon it; or rather, we should say, how far the Parliament, as it now regulates its operations, can discharge these duties; for the question regards not its structure but its functions. No one can seriously contend that any structural, any organic change, would improve its capacity for doing business; no one can doubt that the increase of its capacity must be sought in a functional alteration.

But first we must cast our eyes towards the evil before we treat of the remedy; and here, whatever might have been the inclination of men towards optimistic views in past times,

we will venture to assert that no one can now so far indulge in such pleasing visions as to fancy there is even a doubt upon the total inefficiency of at least one branch of the legislature, for getting through its appointed work — we refer, of course, to the Commons House, overwhelmed as it is habitually with a load of business which it is utterly incapable of despatching — oppressed with bills which it can neither examine nor discuss — loaded with motions which obstruct all useful work without producing the least possible good — tormented with questions that have no definite object except to display the moderate talents of some, the utter imbecility of others — wearied rather than occupied with debates which have no rational object and no end — distracted by squabbles, and wrangles, and misunderstandings, and explanations, which are the scorn of some and the laughing-stock of others, according as each beholder is disposed to censure, or to pity, or to merriment. Altogether this Chamber for some years past has exhibited to the world a spectacle of such deplorable imbecility that men can no longer with a grave face pronounce the words “Parliamentary business;” or, without the charge of insolent and cruel sarcasm, any more use the phrase “wisdom of Parliament,” which once was, as it were, the characteristic title of its attributes.

In a word, the endless speech-making and its consequence, or, at least, its concomitant, the endless adjournments, are the ruin of the House of Commons and the bane of the country. Whatever is the least important is sure to consume the most time — whatever is of any moment is put off for the first five months of each session, and crammed as into a corner, into the last three or four weeks. Every thing is deferred and adjourned; the recess approaches, that is, the appointed day of grouse-shooting, is at hand; and then all the bills absolutely necessary for the Government to carry are passed in a hurry, and left to be amended after their blundering structure has done serious, often remediless, mischief: all the other bills, comprehending measures far more important, but not necessary for the service of the year, are laid upon the shelf, and left to take the chance of some one who has survived the long vacation and the Christmas holi-

days, taking them down, and once more endeavouring to make the most imbecile of legislative bodies direct its attention to their merits.

The sight, when made apparent to mankind, of hopeless impotency, never fails to excite contempt, while it ought only to move compassion. We can hardly avoid despising those who labour under a severe dispensation of Providence. But when the impotent thrusts himself into positions the duties of which require vigour, not only men scorn him from the prevalence of unavoidable feelings—they reprobate him from the exercise of sound and rational judgment. How much more worthy of severe blame is he who voluntarily becomes impotent, and makes himself unable to discharge his appointed duties? The House of Commons is deserving of this stern censure, if it any longer continues to incapacitate itself from the discharge of its duties by voluntarily and wilfully persisting to suffer such outrages on common sense—such consumption of precious time—as ignorant pretensions, as boundless variety, as overweening love of personal display, has of late years been inflicting upon its patience, and upon the patience of the country at large.

It is inconsistent with the plan of this paper to make any invidious personal reflections; yet hard it were to discuss this important subject without having in our eye certain great offenders against all decorum—all convenient modesty—whose interminable discourse occupies and fatigues the Lower House on almost each debate that occurs. We find that these are not men trained to habits of study, conversant with state affairs, gifted with even passable powers of reasoning, adorned with tolerable eloquence; but such as might be reckoned disqualified by their ignorance and their previous pursuits from taking any part at all in political controversy. We also perceive that their intolerable prolixity is sustained, not by pouring forth matter from their own stores, but by reading page after page of figures and of statistics from the Blue Books of the session and other similar documents. It would be an easy matter to name some ten or a dozen such speakers—*non in aliquo numero oratorum*—not debaters, for they reason not; not declaimers, for they have no gift of either rousing

indignation, or carrying away the hearer by powerful statement; or indeed exciting any feeling of pity except for themselves, or making any kind of impression, except upon the clock — who leave the House fresh themselves, while a part of their hearers are exhausted — who slumber as soundly in their bed as the rest of their audience have slept upon their benches, and who are rewarded for the pleasure of listening to their own voices in the evening by the delight of seeing their poor discourse in print on the morrow. It is reckoned that if none of these humble performers were suffered to read, a third or a fourth at least of their talk would be stopped; but still enough would remain to vex the audience and obstruct the public business — so that this measure would yield but an imperfect remedy for the crying evil.

But that some remedy must be found, and steadily applied, who can doubt it? Public business is stopt; session after session passes, and the country bitterly complains that nothing is done; not only much is left undone, but the little that is done suffers in both its proportions and its qualities by the same evil; the Government is reduced to a perpetual compromise, and becomes nearly as impotent as the Parliament; for while any two or three endless speakers have the power of causing a prolonged debate, and so defeating any measure, its authors are fain to give up half that they may save the remainder. All this results from the Commons House being paralysed; though the palsy does not at all affect its speech; for, truth to tell, speaking is the only attribute that remains to this deplorable body. In truth it should seem as if speaking was its only faculty that remained entire, unless perhaps we reckon its eating as alike vigorous; for while from five to seven it is engaged in talk, from seven to nine or ten it gives all its remaining energies to the functions connected with the alimentary canal; and after that hour it again goes on to talk; so that we may say of it as was once said of an Athenian orator¹ who had outlived all his faculties but gluttony and talk, and was thus compared to a sacrificed beast of which nothing remained but the tongue and the paunch. Again, the Parliament, and with it the Government, is falling (if in-

¹ Demades; — but then he *could* speak.

deed we do not use a wrong tense) into universal contempt. Let no thoughtless reformer cry out for the points of the charter, or indeed for any reform in the elective franchise.¹ The extension of the suffrage in 1832 has had a great share in causing the mischiefs we are labouring under. To let in still more votes, and give members more constituents, would increase rather than lessen the evil.

Such being the course of proceeding (so to speak by an eulogistic courtesy) let us see the result in the work performed. Last session of Parliament began on the 19th of January, 1847. Before the Easter recess no less than eleven bills had been passed through both Houses, of which five were quite of course and passed without a word being said; indeed without any person of either House being aware of their existence, or being at this moment aware that they had passed; such as the Eight Million Loan Bill, and the Eight Million Exchequer Bills' Bill; so that the legislative labour had produced four or five Acts of Parliament.² When Parliament had sat six months, that is on the 21st of June, thirty-two had passed, including the Army and Navy Mutiny Acts, the Annual Indemnity Acts, and eleven others of a like kind, and ten more unopposed, so that in six months nine or ten discussed acts had been passed. So the present session began 18th November, 1847; and when it had sat five months, and the Easter recess had come, ten acts had passed, of which four were of course. Before the 18th of July, eight months' sitting had produced twenty-six acts, of which all but nine were of course; such was the amount of business done in these two sessions. Have we taken from extreme cases for our examples? Far from it. In 1846 Parliament met 22d January, and in six months it had passed twenty acts, of which all but eight or nine were merely of course.

But if into such a moderate compass shrink the acts of our Parliament, not so modestly retiring are their words. While before Easter, 1847, eleven acts had passed, of which seven

¹ We need not say that on all political questions the writer of the article is understood to express his individual opinions only.—*En.*

² These numerical statements refer to the bills passed; but as the delay is always of bringing up bills, and not in the Upper House, this affords a fair test enough of the work done.

without and four with debate, the speeches had occupied no less than 3540 pages of Hansard ; and the six months which produced nine debated acts, gave the world 6520 pages of speech-making. The present session of eight months producing nine contested acts, has enriched the repositories of those who store up the manufacture of speeches, with 4810 pages of that valuable but somewhat costly commodity.

But in proportion as the earlier part of each session is passed in talk without work, so is the latter part filled with far more work than human legislators can accomplish in thrice the time. In the last few weeks of the session, 1847, eighty-three acts received the royal assent, of which fifty-seven in three weeks. We have seen that in the first six months of 1846, twenty acts of all kinds passed. In the last four weeks eighty passed. It may confidently be affirmed that no body of reasonable beings ever exhibited to the pity of mankind so striking a disproportion between their sayings and their doings ; so strange a *cacoethes loquendi*, connected with their *impotentia agendi*. We have heard it said that men of no mark whatever have been known to speak four or five hours in the place where Pitt, and Fox, and Sheridan, and Burke, and Windham, had borne sway by their genius, where even these great men had never presumed so far on the patience of their hearers while yet all ears hung on their words, and all that fell from them was worthy of being treasured up ; whereas our modern talkers can certainly not boast of ever having uttered one sentence which any human memory ever attempted to retain, and when they cease to vex the senate and obstruct public business, will descend to the grave leaving not the least trace behind them of ever having lived or spoken.

Now there has followed from this pestilence of speaking a new course of acting in the conduct of business. The adjournment of a debate, in former and better times a matter of most rare occurrence, has now become quite a matter of course ; it is moved and carried almost as soon as midnight comes ; it is moved and carried again and again for a whole week, and often it is renewed the following week : nay, once an adjourned debate was protracted to the end of the second.

week. In the old time before us, men spoke of a debate being adjourned once, as of a strange and portentous event, betokening the vast importance of the subject in consideration, and the deep and general interest which it excited: and yet these were not the days of small men, of powerless debaters, of obscure characters occupying the public scene,—“There were giants in those days.” But our lot is unhappily cast in *facie Romuli* (we must in mercy to the orators of our age translate into the mother tongue) in the dregs of our social system, in the wretched days of Lord John a Nokes, Sir John Styles, Mr. Bavius, and Mr. Mævius,—in the times of dull, ignorant, muddy, empty, senseless, bootless, but endless talkers; and now an adjournment is so frequent, that not a question can be debated without lasting a week, at the least, and stopping all other business.

This result of the speech-making mania is inevitable, for there is by no means a correlative disease in the audience,—there is not a speech-hearing mania. Men without sense, wit, or modesty, or common decency, may speak if they will,—they can compel the House to remain inactive while they are laboriously pouring forth their most poor and vile discourse; but they cannot compel others to listen. “One man,” says the proverb, “may take a horse to the water, but two cannot make him drink.” One Lord J. a Nokes, or one Sir J. Styles, may stop all business by long talk; but ten such (if so heavy a visitation of Providence could be fancied without impiety) cannot make the House hear. Then, as sitting while such things are going on is most fatiguing, most laborious, most unwholesome indeed, at a certain hour all feel most important to be gone; but to leave the endless talkers in possession might be dangerous, lest their fury at being so justly treated might make them vote some subversive measure,—might make them pull down the temple over their impenetrable heads; therefore it becomes a measure of necessary precaution to adjourn; and when all patience has long been exhausted, when human nature can bear no longer, when all resources have in vain been tried, of wool-gathering abstraction of the mind from the scene of torment—of attempted sleep—of retirement to tea—of reading in the

library: at length the debate is ended for the night, and, no business having been done, the House retires to a more comfortable and not more inactive repose. So much has this case become an every day's practice, that one very worthy and intelligent member for some years made it a rule to be in the House at 12 o'clock, and constantly to move an adjournment. He was perfectly inflexible in his resolution, and perfectly successful in carrying it into effect.

This brings us to consider the remedies applicable to the grievous evil complained of by the whole country, because the first measure suggested has been the limiting the rule as to adjournment. This is within the jurisdiction of each House of Parliament: it might be provided by a standing order, that no motion to adjourn the debate should ever be entertained until a certain defined time, such as an hour, had elapsed after a previous motion was rejected. The objections to this course are considerable; but the chief one is, that it ties up the House in circumstances which can never be foreseen, and prevents it from even entertaining a question, when it might be highly expedient that it should be carried. There is also, in our view, a serious objection arising from the certainty that the remedy would be found insufficient; for if at twelve the motion for an adjournment were rejected, at one it might be resumed, and at two it would surely succeed. Now, unhappily, the itch of speaking and of reading men's own speeches is so prevalent, and the number of speakers being nowise limited by their value, there is so large a supply of men able and willing to talk, that we should only have more tiresome debates and longer sittings as the result of a somewhat violent interference with the ordinary course of proceeding. If we are to interfere, at least let us be sure that we shall not do so in vain. It must also be observed, that one such new standing order would not suffice; for the defeated party might give endless trouble by moving to have the House counted out. This power, therefore, must not be allowed to survive the other of moving adjournments, and it is clear that the power of counting is necessary as a general rule. We do, however, think that it would be good, after one night's adjournment, to allow a vote without any debate to

be taken after the vote of adjournment, that no motion of adjournment should next night be made, but the debate then be closed at all events.

The American plan has been proposed. There it had become absolutely necessary to do something, in order to prevent men from occupying the "floor," as it was called, for whole days, nay, for weeks; so an hour was fixed as the length allowed, and now, were a person in the midst of a sentence, and his audience in the midst of a yawn, both the infliction and the relief are suddenly stopped by the President announcing that the sixtieth minute has arrived. We think it hardly necessary to add that this is a most defective and even absurd rule. The term of one hour may be much too long in some cases, much too short in others. Besides, in all such matters there is a great tendency in a *maximum* to become a *minimum*; and we believe that in our Houses of Parliament the result would be to lengthen all short speeches nearly as much as it abridged long ones. Men's minds become accustomed to what is laid down as the rule. Long speeches would come to be considered speeches exceeding one hour. Within that limit no speech would be deemed too long; no speaker who had been less than one hour on his legs — say fifty minutes — would be reckoned exorbitant in his demands on the patience of his audience. A speaker would be gratefully received who spoke only three quarters of an hour. "How considerate! how kind! how concise!" would be the buzz prevailing. "Why, he might have given us a quarter of an hour more, and welcome,—he has spared us so long a time." This must happen almost inevitably. But the utter absurdity of applying to all speakers—to Lord John a Nokes and Lord John Russell, to Sir John Styles and Sir Robert Peel—the same rule, and of applying it to all subjects, to the state of the nation, to peace and war, to Parliamentary reform, and to a turnpike bill, or a railway amendment bill, is so glaring that we need not further deal with the proposition.

We come, then, to the remedy, which must be both safe and effectual, and which arises most naturally out of the consideration applied to the evil itself.

All men feel that a speaker has exceeded every limit,—all men are sensible that a debate has gone on long enough. Then give the speakers notice that they may at any time be cut short,—give the house notice that the debate may be closed. Let it become a practice—and a standing order will suffice to make it such—that any member moving, and another seconding a motion to close the debate, the Speaker shall instantly put the question, and without any debate the vote shall be taken; and if two-thirds of those present agree, the vote shall, without further debate, be taken upon the question under discussion. This is the true remedy; the one already suggested is, however, a good stepping-stone or half-way house to it.

The result of this (called in France the *cloture*) would be, that if a speaker were aware how liable he was to have the sense of the House taken upon the question whether the debate should continue, in other words, whether his speaking any longer was or was not an unbearable infliction upon the audience, those would be restrained by dread of mortification to their vanity who are restrained by no sense of modesty or of decorum, and an exercise of the power would rarely become necessary. It never could be abused, because the House could always decide upon going on; and if any Speaker had been interrupted by personal spleen, the general sense of the House would, by the overwhelming proportions of the majority, be declared in favour of the party interrupted, and against the interrupter.

Our opinion is very decidedly in favour of some such plan as this of the *cloture*. There might be a restriction, by requiring more than one debate to have been had; but we prefer the general, absolute, and naked power, and for reasons which need not be stated.

It is fit that, before we close these statements, reference be made to the Bill of Lord Stanley on the subject of “Delays in Parliamentary Business.” His Lordship made a clear and able statement of the evils arising from the hurried and the imperfect manner in which business is transacted in the House of Lords, and necessarily so transacted by the delay of nearly all the bills till towards the very end of the Session.

This is only one of the evils, which we have described as arising from the incapacity of the Commons to get through their work, or indeed any work, as long as they suffer a few talkers to overwhelm them, and obstruct all business. But Lord Stanley's statement was to the letter true, and it justly raised expectations of a remedy to be by him propounded. It would not be easy to imagine one bearing less proportion to the mischief. He brought in a Bill to make it lawful for either House, after reading a second time any bill sent from the other House, to direct it to stand over, and then, on the very same bill being next Session presented to the same House, that it should become law without going to the other House, from which it had originally come.

To this scheme many obvious objections immediately occurred: first, it was the legislature for the first time interfering with the orders of the Houses; for no one can doubt of what seemed new to the noble author of the measure, that the requiring any bill to pass through certain stages is not law, but only the custom of each House, and may at any moment be altered, or may be at once overlooked on any or on every occasion. Thus any bill may be passed through all its stages at once, or may be passed by the House by a single vote. Secondly; suppose the Commons send up a bill this year, they may next year have changed their opinion, while the Lords may have remained of the same mind, and in favour of the bill. To meet these objections the bill of Lord Stanley was materially altered. It was made a condition, of any measure passing without being anew submitted to the House from which it had proceeded in the previous Session, that the assent of that House to its postponement should have been obtained, and other changes were made which rendered the bill quite nugatory; for it was plain that the whole of its objects could be attained by the orders of either House. We have little doubt, therefore, that this bill will be stopt in the Commons, where it now lies for consideration. Indeed the odds are always in favour of any bill, introduced by a private peer or member, failing to pass through that House. But there is no reason at all to regret the loss of this measure, because it afforded no remedy for the great evils com-

plained of; although Lord Stanley did good service by his full statement of some of these evils to which he succeeded in calling the attention of the Lords.

The amendment often suggested both in our journal and elsewhere, of the Commons giving up their claims to originate all bills in which money is dealt with, would afford very considerable relief to the pressure complained of. We trust this will at once be introduced, if not by the good sense, at least by the prudence of the Lower House. There is a committee now sitting on the business of parliament; and as Mr. Evelyn Denison is its chairman, every expectation may be entertained of the result of its labours, from that gentleman's talents, business-like habits, and suavity of disposition. We await the report of this committee with impatience.

ART. VIII. — TRUSTEES RELIEF ACT.

1. 10 & 11 *Vict. c. 96.*, intituled *An Act for better securing Trust Funds, and for the Relief of Trustees.*
2. *General Order of the 10th of June 1848.*

FEW persons, not wholly dependent upon their daily labour, whether it be of the hands or the head, for subsistence, pass through life without being in some degree concerned in property held in trust, either by those who are directly nominated trustees of it, or by those on whom, in their character of executors or administrators, the law casts the responsibility of a trust. And while the number of persons indirectly interested in the law relating to trusts is thus almost equal to that of the possessors of property, the numbers of those who are directly interested in it as trustees, being themselves executors, or administrators, is very considerable. The numbers affected by this branch of the law must, then, of itself, raise it into importance; and our sense of its importance must increase when we reflect upon the peculiarly difficult and delicate nature of the duties which those entrusted with the discharge of these functions often have to fulfil; duties in

many cases so difficult and delicate, that it may be hard to determine whether the creator of the trust or those who undertake to fulfil it have the greater cause for anxiety.

If the former may have to commit the fortunes of the objects of his tender regard, at an age or under circumstances which make them wholly unable to protect themselves, to the care of persons of whom he can know nothing, to the personal representatives of the survivor of several trustees or executors, the latter are required to carry out another man's will as if it were their own, without the freedom of action which the real owner possesses; and, while they can derive no benefit from the increase of the property committed to their care through their management, however skilful, remain, for an indefinite period, accountable for any loss or misapplication of it; though occasioned only by an error of judgment or insufficient information¹, and transmit their accountability to those who succeed to their property.

Under such circumstances the public seem to have a more than common right to ask that the law relating to trustees should not, by its defects, add to the inevitable risks and difficulties attaching to the office; and we do not surely make any unreasonable demand if we require—

1st. That the law should, as far as possible, clothe the trustee with all rights and powers necessary to the proper execution of his trust.

2d. That it should afford facilities for supplying the place of trustees who may die, or wish to withdraw from the trust, or become incompetent to execute it.

3rd. That it should provide a ready means for enabling a trustee, without injury to the rights of his *cestui que trusts*, to throw off the burden of an office which he may feel himself incompetent satisfactorily to discharge, and relieve himself from responsibilities which he may not feel justified in incurring.

¹ The case of *Knatchbull v. Fearnhead*, 3 M. & C. 122., where executors who had paid away all their testator's estate in the year 1815, were made responsible in a suit instituted in 1833, for losses occasioned by breaches of trust committed by their testator in 1801 and 1804, but of which they were not informed till 1830, is a striking illustration of the position in the text.

4th. That it should afford well-constituted and easily accessible tribunals for compelling the due performance of trusts, and punishing their violation.

We do not intend, upon the present occasion, to enter at all upon the last of these topics. The consideration of the defects of our judicial system in respect to it, leads directly to the wide field for reform connected with the Court of Chancery. We purpose, therefore, to confine our attention to the three first of the above heads; and in regard to these, while we welcome the measure referred to at the commencement of this article as a step in the right direction, we must still lament that much which the law might easily do to facilitate the execution of trusts it leaves undone.

To justify this position, we will shortly pass in review the law relating to executors and trustees in reference to these three subjects; and, first, in regard to the powers conferred on trustees and personal representatives, and the means of their appointment.

Law should be impartial; but in this instance the English law displays its impartiality in an undesirable manner — namely, by bestowing upon each of these two classes of persons some privileges which it denies to the other.

The executor it clothes amply with the powers wanted for the discharge of his office: it vests in him the personal property of his testator, with which alone he is concerned, without the formality of a conveyance, unless, as in the case of bank stock, entry in some official register is necessary to give a title. It confers on his receipts the effect of discharging those to whom they are given from the necessity of inquiring into the right of the executor to sell the property of his testator, or seeing to the application of the proceeds of the sale; while if no person exists whose duty it is to execute the trust, it enables any one interested in the property to procure from the Ecclesiastical Court, by a speedy and inexpensive process, the appointment of a new trustee, under the name of administrator, in and upon whom again it vests the trust property, and confers the requisite powers, as in the case of the original executor.

If, however, there be a partial failure of persons to exe-

cute the trust, the law is far less complying. A testator may have appointed several executors; deaths or refusals to act may have reduced the number to one; that one may be a person in whom, from acts subsequent to the death of the testator, the parties interested in the property place little confidence; or old age, without making him absolutely incompetent to act, may have unfitted him for acting alone. But neither the parties interested nor the executor have the right to secure the safety or due administration of the trust property, by the simple means of filling up the number of the trustees. They may, if they choose, throw the estate into Chancery, have all the accounts taken, discharge the executor, and spend half the property in endeavouring to secure the rest; but the easy remedy of appointing new executors to act with the remaining executor they have not the power to adopt.

The conditions which the law attaches to the office of trustee are, as we have remarked, in amusing contrast to those attached by it to the office of executor. The former has only to be appointed in order that he may possess important powers, but he can be appointed only by the testator personally; the authority to appoint an executor cannot be delegated, except so far as the circumstance of the executor of an executor, or of the last surviving of several executors, becoming in law the executor of the original testator, involves the delegation of it; and there is no court which can supply the vacancy occasioned by the death, incapacity, or refusal to act of one executor, while any one remains capable of acting in and transmitting the trust. It is just the reverse in the case of trustees. The law vests in them no property which is not formally conveyed to them, and attaches to their office no powers beyond those which the creator of the trust confers. But it allows the latter to make what provision he pleases for filling up vacancies among those to whom he has entrusted the execution of his wishes; and, if he does not express his will in this respect, the Court of Chancery will take upon itself to act for him, and provide proper persons to execute the trust, whether the failure of trustees be total or

partial only.¹ The only misfortune is that the process is so costly.

It can scarcely be necessary to do more than to place these opposite systems in contrast with each other, in order to insure the condemnation of their co-existence; both cannot be right. If no inconvenience arises from vesting in an executor, without any formal conveyance, lands held on lease, it is hard to conceive that inconvenience would be found to arise from provision that, upon the declaration of a trust of lands similarly held, they should vest, without any formal conveyance, in the trustee. Nor is it apparent why difficulty should arise in extending the same provision to lands held in fee. Again, can any good reason be given why the efficacy now attached by law to the receipts of an executor, should not also attach to those of a trustee, at least in all cases where the creator of the trust did not direct otherwise? And if advantage is found to arise from allowing vacancies in the number of trustees to be supplied, either by the continuing trustees themselves, or by those interested in the property, why should not the same power be extended to the case of executors? Lastly, if a simple and inexpensive process prove sufficient for the appointment of an administrator, why should a long and costly one be requisite for the nomination of a trustee?

We suggest, then, as a desirable amendment of the law, the assimilation of the provisions relating to the appointment and the powers of executors and trustees.

The power now possessed by the creator of a trust of giving the right to nominate new trustees to any persons whom he may select, should, we think, be extended to the nomination of executors. In default of its exercise, the acting executors or trustees should be allowed to fill up any vacancies occasioned by the death, the refusal to act, the lunacy, the bankruptcy, or insolvency of their co-executors or trustees; and any parties beneficially interested in the property, or the acting executors or trustees in cases where they cannot themselves make the appointment, should be able

¹ *Buchanan v. Hamilton*, 5 Ves. 722.

to obtain the appointment of new trustees or executors in a summary manner, on application to the proper court. On the appointment of a new trustee or executor, all the trust property capable of being conveyed by deed should at once vest in him, either jointly with the remaining executors or trustees, or solely, as the case may be; provision should be made for the transfer of such property as cannot be thus conveyed in the same manner¹; and the executors or trustees for the time being should be enabled to sue in their own names where suits respecting the trust property may be necessary. Lastly, the receipts of trustees, given in the execution of their trust, should discharge the persons to whom they are given from further responsibility, except (of course) in the case of a fraudulent connivance in a breach of trust, wherever the creator of the trust does not require some other person to join in giving them, as is now the case with those of executors.

By an enactment embracing these provisions we are satisfied that a great benefit would be conferred on the large class of persons interested in property held by executors or trustees.

We have already expressed the opinion that there is a further provision which the law should make for the benefit of the trustees themselves, a provision, namely, for enabling them, without injury to their *cestui que* trust, to retire from the office they have undertaken; and we might, if it had been necessary, have justified that opinion by the practice of our own courts of equity, in which this principle has long been recognised and acted upon. The Act of Parliament, and the rules for regulating proceedings under it, referred to at the head of this article, do not, therefore, introduce any new principle in affording, as they are intended to afford, to trustees and personal representatives increased facilities for obtaining relief from their trust, guarded only in such manner as to prevent injury to the interests of the *cestui que* trusts from the improper use of the facilities thus afforded.

¹ The provision in the 1 W. 4. c. 60., requiring the interposition of some person whom the Court of Chancery is to empower to convey the trust property, instead of making the legal estate pass at once to the person to whom the conveyance is ordered to be made, seems to us an imperfection in that otherwise valuable act.

Before the passing of the 10th and 11th Victoria, c. 96., the only mode by which a trustee or executor could discharge himself from the execution of the trust, unless there was a suit already pending in the Court of Chancery respecting the trust property (except in the single case of legacies paid into the Bank of England under the 36 Geo. 3. c. 52. § 32., to the account of parties to whom, from their infancy, or absence from the country, payment could not be made), was by a bill to which the *cestui que* trust were made parties.¹

The application was in general accompanied by an inquiry into the liability of the retiring trustee, in order that, if the court was satisfied with his conduct, it might give him a release.² But the court, if not satisfied that the trustee had a reasonable ground for asking to be discharged, would sometimes refuse to set him free from past accountability³, and throw the costs of the application upon him.⁴

The recent act materially modifies the practice of the court in these respects. It enables all trustees, executors, or administrators, or the majority of those acting in any particular case, to substitute the Court of Chancery in their place, by paying, with the privity of the Accountant-General, the trust monies in their hands into the Bank of England in the matter of the trust, or transferring or depositing stocks or securities in like manner into or in his name: the payment, transfer, or deposit being accompanied by an affidavit, "shortly describing the instrument creating the trust, according to the best of their knowledge and belief." The receipt of the cashier of the Bank for money so paid, or the "certificate of the proper officer of the transfer or deposit of such stocks, or securities," is "to be a sufficient discharge" to the trustees &c. for the money paid, or the stocks or securities so transferred or deposited.

The act goes on to provide: —

"That such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, or deposited as

¹ Exp. Anderson, 5 Ves. 243.

² ——— Osborne, 6 Ves. 655.

³ Stemmett v. Bainbridge, reported in Lewin on Trusts, 468. 2d ed.

⁴ Ibid. Greenwood v. Wakeford, 1 Bea. 581.

aforesaid, and for the investment and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties as to the Court shall appear to be competent and necessary in that behalf; and service of such petition shall be made upon such person or persons as the Court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to re-hearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted."

The act then empowers the Lord Chancellor, with the assistance of the Master of the Rolls, or one of the Vice-Chancellors, to make "such orders as from time to time shall seem necessary for carrying its provisions into effect."

Under this clause the Lord Chancellor, with the assistance of Lord Langdale, issued on the 10th of June last an order, providing:—

"I. That any trustee desiring to pay money, or transfer stock or securities into the name of the Accountant-General of the Court of Chancery under the said act, is to file an affidavit entitled in the matter of the act, and of the trust, and setting forth—

1. His own name and address.
2. The place where he is to be served with any petition, or any notice of any proceeding or order of the Court relating to the trust fund.
3. The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into Court to the credit of the trust.
4. A short description of the trust, and of the instrument creating it.
5. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money

transferred, deposited, or paid in under the act, as the Court may think proper to make or direct.

“ II. That the Accountant-General, on production of an office copy of the affidavit, is to give the necessary directions for the transfer, deposit, or payment; and to place the stock, securities, or money, to the account of the particular trust; and such transfer, deposit, or payment, is to be certified in the usual manner.

“ III. That the trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in or entitled to the fund.

“ IV. That such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

“ V. That the trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein or entitled thereto.

“ VI. That the parties interested in or entitled to the fund are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

“ VII. That no petition is to be set down to be heard until the petitioner has first named a place where he may be served with any petition, or notice of any proceeding or order of the Court relating to the trust fund.

“ VIII. That petitions presented and affidavits filed under the said act are to be entitled in the matter of the said act (10 & 11 Vict. c. 96.), and in the matter of the particular trust.”

It is clear that the trustee will not, by a proceeding under this act, discharge himself, as he might do by a regular suit, in which the trust accounts were taken, from liability for his acts previously to placing the trust funds under the care of the court.

Guarded as it will be by the above orders, the facility of transferring the burden of a trust to the Court of Chancery, afforded by the Act of Parliament on which they are founded, will, we believe, operate to the advantage both of trustees and *cestui que* trusts. To show that such a guard was needed it is not necessary to do more than refer to a case, *In re Sharpe*, reported in the Legal Observer for July 8. 1848, before the Vice-Chancellor of England. Here a testator left

a sum of 2000*l.*, to be divided, after the death of his wife, among her nephews and nieces living at her decease as she should appoint, and, in default of appointment, equally. She died, without making any appointment, in September last. So far as appears from the report, the case was free from any difficulty, except that which trustees, from their personal knowledge of the family, are peculiarly fitted to deal with, the ascertaining the persons who answered the description in the will. They were six in number. The trustees, availing themselves of the facilities afforded by the Act of Parliament, paid in the money to the bank, filing an affidavit describing the will, but affording the court none of that information as to the persons who, under the circumstances, had become entitled, which they possessed, but which the court could acquire only through the expensive machinery of affidavits, verifying certificates of baptism, &c.; and, according to its present practice, by means of a reference to the Master. Some of the parties, interested in the fund, presented a petition to the Vice-Chancellor Knight Bruce, to obtain payment of their shares, upon which a reference to the Master was ordered in due course. But as this petition applied only to part of the fund, another petition from others of the parties interested in respect to their shares, became necessary: this petition was presented to the Vice-Chancellor of England, when his Honour, after observing that he was by no means satisfied that the trustees had effectually discharged themselves from the trusts of the will, made an order for a reference as to the shares of the petitioners, but without prejudice to any right which the legatees might have to institute a suit under the will.

Under the order of the 10th of June, the courts will in future be furnished, on the responsibility of the trustee, with the names of all parties whom he considers interested in the trust fund, and thus have the means of checking the useless cost liable to arise if each of several persons interested in an undivided fund separately applies for his own share.

The consequence of erroneous information given by the trustee, unless the circumstances are such as to make error excusable, will probably be liability to pay any costs or make

good any loss arising from the error. The direct benefit derived by the *cestuis que trust* from the information given, must depend upon the degree in which the courts are disposed to act upon the statements of the trustees, without satisfying themselves of its correctness by formal inquiries; and probably their readiness thus to act, will greatly depend upon the explicitness of the information and the character of the trustees. There are, however, so many cases in which much additional expense must necessarily be incurred in the administration of a trust fund by the Court of Chancery, above that which would be incurred were it administered by trustees, because the personal knowledge of the trustee enables him to do, without proof, what the court can do only on formal proof, that the practice of substituting the Court of Chancery for private trustees, even under all the safeguards offered by the rules now established, should such a practice become general, seems likely to be of a very doubtful advantage to the *cestuis que trust*. While, therefore, we approve, on the whole, of the recent alteration of the law, we trust that it will be the prelude to measures affording greater facilities for the appointment of trustees, and the vesting of trust property in them,—an emendation of the law, in our judgment, likely to prove more valuable than the amendment which forms the subject of the present observations.

ART. IX. — LAW LECTURES.

WE have repeatedly urged upon our readers the importance and necessity of establishing a Law University, and it is with no ordinary satisfaction that we have seen that project so confirmed and strengthened, as to leave no doubt in our minds of its ultimate success. From the first we have desired that it should be founded by the aid and with the concurrence of the Inns of Court, who have both the necessary funds, and much of the machinery ready at hand. If possible, in this as in all other cases, we would build on the

old foundations, we would restore rather than create, we would revive rather than originate. We would far rather see these learned bodies, which are so respectable for their antiquity, awake to the new duties which they are called to perform, and reanimated by a fresh and living spirit, than see arise by their sides brand new creations, which would have to fight for a place among the institutions of the country. Still, whatever our wish on this head may be, we must proceed onwards: if our great legal bodies will be content with their present position, new ones must be formed: we wish to encourage all patience and forbearance; but the necessary amendments must be distinctly treated as a right, and not as a favour; and we begin to perceive signs of a not unreasonable impatience at the slow progress that has hitherto been made.

Moved by various significant warnings; pressed upon by a long-expressed, heavy, and accumulating body of opinion, as to the absurdity of the present system; surprised, perhaps, by some lively symptoms of insubordination arising even from members of the overruling bodies, the Inns of Court have themselves commenced the work of reform; and in these days of revolution and counter-revolution, we are not surprised that these first and somewhat indecisive steps have called forth but little approbation, and have even, in some quarters, provoked a reactionary movement. It must be our business to consider the manner in which these steps have been taken: whether they have been commenced, not only in good faith, as we certainly believe, but in good heart, and whether, if proceeded with in the same spirit, there is a reasonable prospect of success. Two questions, indeed, almost necessarily suggest themselves, which we shall rather glance at than formally discuss: 1. Have the necessary and proper steps been taken? and 2. If so, what has been the result?

The only proceeding towards the formation and establishment of a Law University which has yet been taken by the Inns of Court, is the appointment of four lecturers, or professors, on certain branches of the law: 1. On civil law; 2. On real property and conveyancing; 3. On common law; and 4. On equity. The plan or scheme under which they

were appointed was promulgated more than two years ago¹; but it has not been completed, the fifth lectureship — that on constitutional, criminal, and crown law — not having as yet been founded, nor, so far as we know, have any steps been taken for that purpose. Now, if lectures were to be established at all, it cannot well be said, that the scheme proposed was too extensive. We are sorry to find, therefore, on turning our attention to it, at no small interval of time, that it has not been completed, and still retains all the uncertainty of an executory project.

Let us next see what were the main objects to be obtained by the establishment of lectures. We apprehend they were two: 1. The declaring or proclaiming the law on each particular branch; 2. The teaching such branch of the law.

The first, be it observed, was at least as important as the second. We know no better mode of obtaining accurate and complete definitions and expositions of the law, than its oral declaration by a skilled and competent lecturer, to an audience composed in part, at least, of persons also skilled and competent. There can be no better preparation for a Code or Digest of the law. It will be remembered that many of our best institutional works have been so composed.

Now it appears to us, that in the plan on which the lectures have been established, very inadequate means, or rather no means at all, have been purposely taken to insure the first object. They are apparently intended for students, and students alone. The bar may attend, but they must attend as students. This is not placing them in their right position, and it imposes on them a payment to which they should not be subject. On the contrary, the bar should be invited and encouraged to attend. The lectureships have not been insufficiently endowed—we have no complaint to make on that score—and it would have been a fair and gracious thing to have extended the privilege of attendance on the lectures to the barristers of all the Inns of Court. We are quite sure that the lecturers themselves would not have objected to this.

As to the first point, then, it does not appear to us that

¹ See 4 L. R. 444.

any attention at all has been paid to it. Let us see how it has fared with the second. And here let us consider the difficulties under which the first lecturers have been placed, and in doing this it is our anxious wish to uphold an undertaking which we believe will ultimately be attended with inestimable benefits.

Let us mention, then, some of the disadvantages under which the lecturer is now placed. Entirely new to the duty which he has undertaken, he has little to guide him in the way of example: he is as unaccustomed to lecture as his audience to listen to lectures. He must discover all for himself, and must make or mar a new system. He knows not what are the portions of the law which are best adapted to be so unfolded. All is raw, and new, and entangled; and clear views can only be obtained by constant practice. These are some of the difficulties from within. Without, the view is not much more encouraging. In some of the Inns the Bench is at all events divided as to the advisability of the whole plan. In these the dissentient benchers are inclined to shake their heads, and doubt whether any good will come of it. All that chattering race which so peculiarly infest the law, who live on the doings of other men, are inclined at present to oppose the lecture-system (just as when successful they will all chime in in its praise); nor is it likely, under these circumstances, that students should be peculiarly in favour of it. What then may be fairly required? We answer steady support of the lecturers from the benchers. Let all honour and distinction be shown them. If the benchers wish that confidence should be placed in the new system, they must show that they have confidence in it themselves. And from the lecturers themselves, labour and learning, and, above all things, devotedness to the cause, and energy in expounding the subject. Much necessarily depends on them. They are educating future lecturers; they are teaching not only themselves, but others, to overcome the difficulties of their vocation. Around them stand a little band of followers who will of necessity imitate them, and carry on the work they thus commence. This will henceforth be a department of the profession, to the exercise of which many will turn their attention. We see

symptoms of this feeling already, and it must increase. The endowment and position, both of which we apprehend will be rather improved than infringed upon, will alone form no inconsiderable inducements. But nobler sentiments than these will arise and urge men on: the desire to teach, implanted widely in the human heart, will communicate itself to the science of the law, and entwine itself around it. What is the Judge but a teacher of the law as applied to the particular circumstances before him? And the lecturer will also occupy a distinct position in the profession as a teacher. Now it is once commenced, if only steadily supported and energetically pursued, we have no fear of the lecture-system falling through. On the contrary, we venture to predict, that for one law-lecturer in the year 1848, we shall have ten in the year 1858. That class of men who have, or fancy they have, some important truth to divulge, will take this mode of bringing it before the world. The class exists in the law as in other professions, and it will discover itself in this fashion.

As to the lectures already delivered, it is surely as yet premature to express any opinion as to the practicability or expediency of the system of law lectures, by reference to what has there occurred. If any of them had met with extraordinary success, it might fairly have been ascribed to the novelty of the undertaking; and if the reverse has taken place in any of these classes, this is no fair ground of discouragement. But all have not the power of delivering lectures with effect. The proper men will discover themselves in this as in the other walks of the profession, and a school will thus be formed. In the meantime, we trust we shall be permitted to watch with jealousy the steps taken by the Inns of Court in their behalf, and to make one or two suggestions.

In the first place, we could wish that some uniformity of regulation in all the Inns of Court should be promoted. We would not be very severe as to this. In the first instance, it may be the best plan to allow each lecturer to take his own method, and thus "proving all things, to hold fast that which is best." Still this may be carried too far.

Next, we hope that lectures in all the classes may be

delivered through the whole course of the legal year, and not be confined to Term time, as has been the case, we believe, at one Inn.

Thirdly, we think that if a full examination be not rendered indispensable to the degree of a barrister, and that of all other practising members of the profession, the attendance on lectures should at all events be in some way recognised as part of the system of legal education.¹

Fourthly, the system cannot be fairly tried until the lectures are thrown open to all who choose to attend. It is impossible to draw any just distinction between one law student and another. They are all seeking to know what the law is, and though they differ in extent of knowledge, this will ultimately assist, rather than hinder, the objects to be obtained.

¹ We have been favoured with the following document, by which it appears that the learned professors agree with us as to this. It has been addressed to the several Inns of Court :—"The undersigned, being impressed with the conviction, confirmed by their experience as far as it extends, that the system and practice of English law concurrently with general jurisprudence, may, with advantage to all students for the bar, form the subjects of public lectures regularly attended by them, take leave respectfully to represent to the benchers of the four honourable societies, that attendance, to some reasonable extent, upon the law lectures which are now being delivered in the halls of the several Inns and under their sanction, might usefully become, for the future, part of the qualification to be required in candidates for the degree of barrister.

"The undersigned desire further to express their opinion, that the efficiency of the professorships which have recently been instituted, is not adequately secured, without the public sanction of the benchers of the Inns of Court, to some system of voluntary examinations, by means of which successful application to the studies which may properly be required in students for the bar, may be duly recognised, and the competition of the students in such exercises encouraged.

"(Signed)

"GEORGE SPENCE, Professor of Equitable Jurisprudence (1848) in Lincoln's Inn.

"ROBERT HALL, Professor of Common Law in the Inner Temple.

"GEORGE LONG, Reader on General Jurisprudence and the Civil Law to the Honourable Society of the Middle Temple.

"WILLIAM DAVID LEWIS, Lecturer on the Law of Real Property and Conveyancing, in Gray's Inn."

"*London, Trinity Term, 1848.*"

While making these observations we will say that we have witnessed with particular pleasure the proceedings both of the benchers and the lecturer at Gray's Inn. In this respect this Society appears to us to be far beyond all the others, and should form, in almost every thing, a model for the rest. From the first the lecturer (Mr. W. D. Lewis), with the full confidence and support of all the benchers of that Inn, has devoted himself to the duties of his office. He has established mootings, has propounded questions for his class, and conducted a series of private examinations. He has been heartily backed by the benchers, who, on the 7th of June last, themselves conducted an examination in the Law of Real Property, both written and oral, which, we understand, was highly creditable to those who obtained honours.¹ Mr. Lewis has established the fact that lectures on the law of real property may be successfully delivered, and we look forward with great interest to the further prosecution of his course as a law lecturer.²

¹ We give the result of this examination as follows : —

Mr. Wm. Augustus Clark, Middle Temple	-	-	} 1 Æq.
Mr. Edward Harrison, Middle Temple	-	-	
Mr. John Lucie Smith, Middle Temple	-	-	2
Mr. John Brewer, Middle Temple	-	-	} 3 Æq.
Mr. Samuel Scott, Lincoln's Inn	-	-	

The class-list was published in Gray's Inn Hall, at a numerous meeting of the benchers and members of the society, on Wednesday evening, June 14th, 1848, and a certificate evidencing the degree of merit attained by each of the above named gentlemen, has been given to him under the hand of the treasurer of Gray's Inn, and Mr. Samuel Turner, Mr. Thomas James, and the Lecturer on the Law of Real Property, the three last named gentlemen being the examiners on the occasion referred to.

² We wish we could extend this commendation to his inaugural address on the 4th of November, 1847, in the hall of Gray's Inn. We admit the difficulties of his task, but the unbroken strain of eulogy of the existing law, both in its practice and its theory, which runs through this production, is a little too loudly expressed. We agree that as a lecturer on the law, Mr. Lewis has nothing to do with its amendment,—his business is to declare what that law is: but in the present day and in the face of the reiterated condemnation which the present practice of conveyancing has received from all who have considered the subject, it would have seemed impossible to us to have composed an introductory essay on the law of real property, without a single allusion to its defects and wishes for their amendment. It is true, as Mr. Lewis observes, that Blackstone says that "the subtle distinctions incident to landed property are the most difficult to be un-

We have entered upon this brief notice with the earnest desire of serving a cause which we have so much at heart ; and we wish rather to promote the intentions of the rulers of the Inns of Court than to throw any discredit on them. But we are much more anxious for the welfare of a good system of legal education than for that of institutions whose duty it is to secure it, and who neglect this, or fall short in performing it.

Thus far as to the Inns of Court and their plan of legal education. But if they did all that we propose, they would fall far short of establishing a law university. This must embrace all branches of the profession, and all branches should be properly represented. We should hope that the Law Institution would be brought within the range of its operations. The profession is under obligations to this respectable body, for having led the way in successfully instituting not only lectures but compulsory examinations. It is of great importance that these should be rendered as perfect as possible ; and without in any way undervaluing the means now taken in securing these objects, we think they might be improved by this Society. We do not think that the present system of examination by written questions and answers, is nearly so advantageous or likely to secure the end in view, as a mixed system of written and oral examination, similar to that commenced by the benchers of Gray's Inn. We certainly look forward to the establishment of a Law University which shall embrace all branches of the profession, in which all existing institutions shall aid without interfering with their separate existence ; and we are much mistaken if many persons are not only of our opinion, but are preparing a machinery for acting effectually on this opinion.

derstood," but he adds, they "are the least worth the pains of understanding except to such gentlemen as intend to pursue the profession" (1 Com. 36.), thus treating them as having but little value in themselves. This, as we think, unhappy commencement of his course, is the only drawback from the merits of Mr. Lewis as a lecturer, and this we feel bound to notice in justice to the principles we honestly profess.

ART. X. — COMPARATIVE ANATOMY OF JUDICIAL PROCEDURE. — ON THE RECENT CONSOLIDATION OF THE COURTS OF LAW AND EQUITY IN NEW YORK.

1. *Letter to Gulian C. Verplanck, on the Reform of the Judicial System of this State* [New York], by a Member of the New York Bar. [DAVID DUDLEY FIELD, Esq.] December, 1839.
2. *Assembly* [of New York State] *Paper*, dated March 2. 1842, No. 81., being Report in part of the Committee on the Judiciary in relation to the Administration of Justice. With Three Bills drawn by D. D. Field appended, entitled respectively *An Act to improve the Administration of Justice*; *An Act for the more simple and speedy Administration of Justice in the Courts of Equity*; and *An Act to simplify Indictments*.
3. *Re-organisation of the Judiciary. Five Articles originally published in the* [New York] *Evening Post on that Subject*. By DAVID DUDLEY FIELD. New York, January, 1846.
4. *Constitution of the State of New York*, adopted November 3. 1846.
5. *What shall be done with the Practice of the Courts? Shall it be wholly reformed? Questions addressed to Lawyers*. By DAVID DUDLEY FIELD. New York, January, 1847.
6. *Act of the New York Legislature of the 9th April, 1847, requiring the Commissioners appointed by the new Constitution* [Art. 1. s. 17.] *to provide for the Abolition of the present Forms of Actions and Pleadings in Cases at Common Law; and for a uniform Course of Proceeding in all Cases, whether of Legal or Equitable Cognizance*.
7. *State of New York. First Report of the Commissioners on Practice and Pleadings: Code of Procedure*. Albany, 1848.
8. *State of New York in Assembly, March 31. 1848. Amendments made by the Senate, and concurred in by the Assembly, to the Code of Procedure, as reported to the Legislature by the Commissioners on Practice and Pleadings*. Printed "in document form."

It will be generally acknowledged that the science of law is an inductive one, and that the propriety of existing rules and

of proposed alterations is to be tested by facts and not by opinion. As to criminal law, this truth seems more fully acted upon, than as to civil law. Hence, for one reason, it is that a greater number of returns are ordered by the legislature respecting crimes and punishments, than respecting civil procedure. But, after all, it is a bare, and not fruitful assent that is yielded; and it is therefore the duty of the jurist perpetually to place in view the essential importance of this same truth to every part of the subject of law reform. Our real advance in legal amendment may, we believe, at all times, be measured by the degree in which the methods of investigation we are using approximate to the methods of investigation used in natural science. Until we find jurists acknowledging in all their investigations that the general principles of their science lie hidden in the nature of things, just as do those of astronomy or chemistry; and until we find them using precisely the same scientific methods as do the astronomer and chemist, we believe no very substantial progress will be made in the reform of the law; while if they sedulously follow the same methods, we shall see principle after principle conclusively established, and canon after canon, applicable not to one only, but to all the realms of law, so convincingly laid down as to be full as indisputable as the rules of chemical affinities or of gravitation.

This principle of inductive investigation, so necessary, as we have said, to the jurist in his pursuit of the truths of the science of abstract law, or jurisprudence proper, is eminently applicable to another science totally distinct from, though unfortunately perpetually mixed up with the science of abstract law, we mean the science of judicial procedure,—*a science in which accuracy of conclusion is of incomparably greater moment to the well being of society than accuracy as to abstract law.* This truth should never be forgotten. While it is necessary to the existence of society that *some* rules should be laid down relative to property, descents and so forth, it is, as to a vast number of the points to be embraced, much a matter of indifference what these rules are. We would instance, as some of these comparatively immaterial things, the rules, prevalent here, unknown in most civilised countries, which

ascribe totally distinct natures to real and personal estate ; the rules we lay down as to descent, such as whether we shall follow the plan of the common law, gavelkind, or borough English, and declare the eldest son, all the sons, or the youngest son the heir, and so forth. But with reference to judicial procedure, on the other hand, — with reference, that is, to the efficiency of the methods by which we apply the abstract law to each recurring case, — the utmost scientific accuracy is of vital importance. If by a new method, you increase that accuracy ; by that increase, and without labour or trouble to mankind, you have actually increased the value of every particle of property in the hands of every individual member of the community ; — *ipso facto*, you have absolutely created a proportionate amount of wealth. As, on the contrary, you diminish that accuracy, you diminish the value of every tangible thing and destroy so much wealth ; and if you destroy all procedure, and so make the Courts into machines which cannot by any possibility be put in motion, you destroy all property ; and (military or other regulating power not being substituted) you dissolve the very frame of society. For never let it be forgotten that society cannot exist unless the right to property is maintained ; and that all property whatever, exists only in the existence of the judiciary ; which by the way (and we question if our friends in America fully consider this) is the reason why *all* property (and not that in litigation merely) should be taxed to pay for the judiciary.

From these considerations it will follow that to determine what the abstract law on civil rights should be, we may, to a great extent, well rely upon the opinions, even if empirical, and if formed with no reference to any statistical investigation, of the intelligent men of the age¹ ; while as to procedure we

¹ To a great extent the public sentiment on a subject is a more important ground upon which to legislate than is any abstract conclusion on jurisprudence, however accurate. The first essence of a law is that it should be one so consonant with general opinion as that its obedience can be enforced. We are happy to see this principle of legislation recognised in the late report of the Commissioners as to marriage with a deceased wife's sister. How can a law be good, if the people will not obey it ? was a great argument of Demosthenes. — [Olyn. iii.]

ought to rely on no new opinions, but to aim at the *experimentum crucis*, which, with reference to procedure, is unquestionably attainable. For the former, our legislative committees, our commissions on legal reforms, and our law amendment committees, each of them possess at all times, and within their own circle, most of the knowledge required to enable them to come to a conclusion sufficient for the practical purposes of society; while, as to the latter, all their opinions put together, and added to (or, to speak more accurately, averaged with) all the opinions of all the witnesses they can get hold of and examine, will lead them very little nearer towards, if not remove them farther from, the truths they are desiring to discover.

Admitting, then, that the needs of mankind on these matters will be best served by discovery of the general truths of the science of judicial procedure, it will be asked, perhaps, that we should describe the manner we would proceed to discover them, using this inductive principle of investigation. We answer, that we would proceed solely on a careful examination of the rules of existing procedures of all Courts of all countries, whenever we can get at them; and, which is of great importance, not of the rules merely as we may find them in books of *practice*, which, we are sorry to say, is nearly as far as any jurist ever goes, but of the actual results, as recorded in the history of the cause, and in the bill of costs. The wisdom of the Judge's decision we lay on one side. Procedure has little to do with that. It may make the decision more inconclusive and worse; it cannot make it better. With a fool for your Judge you will have foolish decisions under all conceivable forms. But the rules of procedure have everything to do with the practical efficiency of the Courts, with the time occupied, and with the money spent in each proceeding; and these, again, have a very great deal to do with the value of the property of the entire community. The great outlines of every scheme of procedure in every Court of every country must be the same. These lie in the nature of things. Call it bill, petition, allegation, information, declaration, plaint, or complaint, or what you will; let it be written or oral; still this first movement towards the Judge is in its nature the

same thing: so also the answer, plea, and so forth. So also of the trial, and so of the execution by the Court. To proceed inductively, we must investigate every method we can find in use, particularly in its important results of time and cost. We must study, first, the positive anatomy of each, and then the comparative anatomy of all; and *must never forget that the essential facts are recorded in the lawyer's bills, and cannot be found elsewhere.* If every country had its law amendment society, and every law amendment society had for its members every one of the eminent lawyers of the state, and they talked by the year, of matters drawn from their own speculations and recollections, and *did not refer* to the actual facts as to time and expense contained in the bill of costs, all these put together could never *conclusively* establish any principle of procedure. All the lawyers in the world do not necessarily make up one jurist — still less one of those philosophers whom, for want of a ready-made term, we will call a procedurist. The questions the procedurist has to determine are all of the nature of the one put in the satire: —

“Whether by common law or civil
A man goes *sooner* to the devil;”

and to determine these all-important points of time and tendency, he must have reference to some collection of recorded observations. This collection as much exists as to procedure in the lawyer's bill of costs, as it does as to astronomy in the books at Greenwich. But the latter are the basis of the deepest and most pains-taking study of the profoundest philosophers. Our Law Amendment Society numbers some hundreds of members, and which of them looks, astronomer fashion, to the bills of costs, as continuing a body of observations to be by him reduced?

This is a long *proemium*, but we do really believe, from what we see and hear among our brother law reformers, that it contains important and much overlooked suggestions. When a man is going to build a house, he takes care to have both plans and estimates. Our practice-makers are much too ready to be satisfied with plans only; and rarely, as far as we know, require the money and time estimate also;

and as to plans, they too often rest satisfied if these look architecturally pretty, without considering whether they are structurally good.

But to proceed to the interesting subject which we have before us. Almost all the great points of the science of judicial procedure still require determination, for this country at least. The general truths, if such there are, must be applicable to all Courts: but we have almost as many different theories of procedure in operation as we have classes of Courts. Chancery Courts — Bankruptcy Courts — the great old Common Law Courts — the little new ones — Admiralty, Ecclesiastical, and Scotch Courts — each has its own patent, and infallible, and super-excellent way, peculiar to itself, of doing what is common to all. As to every conceivable step of a cause, all we can say is, that if it so be, that any given method now in use, is scientifically right, the rest are certainly all wrong. How is the procedurist to find which is right? The bills of costs will enable him to judge almost to a certainty, which is most nearly right, and the comparison of time and cost, made separately with regard to separate steps, having in view also the stakes in issue, will undoubtedly do a very great deal for him. But he will also be wise to go for subjects for his scalpel-knife to foreign countries, particularly to those whose schemes of jurisprudence are most like our own. Of all countries, none presents so rich a mine for discoveries as does the state of New York. Have we no statesman in England resolute to do his duty in these matters? If so, we should have pronounced it impossible but that some competent expedition of discovery would have been fitted out to the new Courts of New York long ago. Send expeditions to the North Pole or north-west passage indeed! Of what public value are all the facts those icy regions can contribute, supposing we could come to know them as well as we do Middlesex itself, compared with the value of those truths respecting judicial procedure, which we should unquestionably learn from investigating the working of the great experiments made in America, particularly the later ones; — experiments not hasty and empirical, like too many of ours, but made, as every page of the interesting books enumerated at the head

of this article abundantly prove, on an intimate knowledge of all that we do, and of all our propositions in this country, — a knowledge which, had we here a Minister of Justice, and did we in judicial matters nevertheless go on as we do now, would be to his indelible disgrace and inevitable dismissal.

Our Court of Chancery, is it not an admitted abomination? There is scarcely a wise state object bearing on the social arrangements of England or Ireland, to which its infamous defects do not present obstacles, often all but insurmountable. Look to Ireland, for instance, and the Incumbered Estate Bill; or look at the plunder of minors there carried on under its special auspices; or look to joint-stock companies, those modern developments of true socialism, knitting together in partnership vast numbers of individuals, and giving them a common social interest, accomplishing vast social ends by the wide accumulation of small means, trying great experiments at small personal risk of loss, and making all the members common guarantees for social order and advancement. How detrimental has this inoperative or *mis*-operative Court been to their healthy growth! To perceive the encouragement it gives to their vicious growth, we need only look to the history of the railway companies aimed at by Lord Dalhousie's bill.

Our Ecclesiastical Courts, again, — a perpetual source of irritation where irritation is most to be deprecated, among the religious bodies of the country, and of civil mischief to every one, by their operoseness and diocesan mode of action. Does American experience offer us any broad truths applicable to such cases as these? From the American statutes and their practice books, we can see that knowledge is to be gained, though the full value of their experience can, we fear, only be ascertained by investigation of their workings made, scalpel-knife fashion, on the spot.

These observations forcibly occurred to us on perusing the works before us¹; and it seemed of more value to lay them before our readers, than to attempt any full analysis of the late judicial and procedure changes in the state of New York.

¹ To render our series of works complete, we should have had the debates in the convention on the subject of the judiciary.

Every part of the procedure code requires perusal before any really clear understanding of any part can be attained. We will, however, lay a slight sketch before our readers, not without the hope that on a future occasion we may find opportunity to give fuller details.

The legislatures of the several states of the North American Republic are not like our legislature—absolute, but have their authority expressly conferred by the state at large, meeting from time to time in convention, and drawing up a constitution. In the recently-adopted constitution of New York State, provisions were introduced (mainly in consequence of the writings of Mr. Dudley Field), abolishing the Court of Chancery, and declaring, “that there shall be a supreme court, having general jurisdiction in law and equity¹,” and requiring the legislature to appoint three Commissioners to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the Courts of Record of this state, and to report thereon to the legislature.

The act passed thereupon required the Commissioners to “provide for the abolition of the present forms of action and pleadings in cases at Common Law, for a uniform course of proceeding in all cases, whether of legal or equitable cognizance,” and for simplifying the language of pleadings, and abolition of useless proceedings.

The present code is the first fruit of the Commissioners’ labours. It relates only to the proceedings and pleadings in civil actions, and to the necessary changes in the jurisdiction and functions of the Court. It is intended by the Commissioners to extend their work till they have prepared a code of procedure which shall comprehend the whole law of the state concerning remedies in the Courts of justice in all cases, civil or criminal.

The code commences with a set of “general definitions and divisions,” intended to explain and limit the present act, and to show what relation it bears to the entire code of pro-

¹ The Commissioners say that “it is not a little singular that this important change in the judicial establishment owes its origin mainly to the fact that the injustice of subjecting the party to the uncertainty of what Court had jurisdiction for him, was the result rather of the modes of proceeding than of the rules of determination adopted by the Court.”

cedure. By these all remedies in Courts of justice are divided into actions (or contentious proceedings, whether civil or criminal) and special proceedings.

The act is divided into two parts: first, as to Courts of justice and their jurisdiction; second, as to civil actions.

Respecting the first head, our space will allow us to say but little at present, though we had marked very numerous subjects for extract and comment. There is much on the heads of jurisdiction and appeal we do not fully agree with, particularly as to restriction of appeals in interlocutory matters, and as to the arrangement "by which Judges sit as appellate authorities over one another, A. and B. being appellate Judges over C., C. and B. over A., and C. and A. over B." Our English experience, when the Seals were in commission, certainly was quite conclusive against any plan of this sort.

The scheme of amalgamating the jurisdiction of all the Courts, so far as metaphysical distinctions prevailed, and the consequent union of legal and equitable cognizance, has our warm admiration; but the question, how far it is wise to measure jurisdiction by the amount at stake, is one which requires, in our mind, a very thorough and scientific inquiry. We do not like rough justice for the poor, and polished justice for the rich. Public morals require a rule exactly the reverse, if all justice is not to be alike polished. The plan by which the judgment of the Small Debts' Courts can be enforced throughout the whole state is worthy of study.

The second part of the code relates to the form of civil actions — the time of commencing them — the parties — the place of trial — the manner of commencing, &c. the pleadings — of provisional remedies (re-arrest of parties and bail, injunctions, interlocutory orders, &c.) — of the trial and judgment — execution — costs and appeals, and miscellaneous and general provisions (as arbitration, confessed judgments, examination of parties and witnesses, &c.). And to the whole code there is an appendix containing the form of proceedings. One relating to a subject of equitable relief we copy.

For specific Relief on account of Breach of Trust.

A. B. complains
 that C. D. did, on the day of , 18 , by an instrument
 then duly executed by all the parties therein named, of which a
 copy is hereto annexed, take upon himself the execution of the
 trusts therein mentioned, and has nevertheless committed the
 following breach of trust * * *

Wherefore the plaintiff demands that the defendant may be
 restrained by injunction from any further disposition of the trust
 property, compelled to render to the plaintiff compensation in
 damages for the breaches of trust, removed from the trust, and
 another trustee appointed in his place.

Dated, &c.

This form alone, we think, will show our readers that the
 whole scheme as to forms has somewhat of a Common Law
 bias in it. On the principles of this code would not the
 prayer for general relief be the only right prayer?

A few extracts from a speech of an "eminent legal mem-
 ber" of the convention will show the chief objects in view in
 the recent changes. After pointing out the difficulties and
 defects of the Common Law, he says —

"To obviate these defects in the law a clerical Chancellor intro-
 duced the civil law practice, — a practice which, however disfigured
 in some places by unnecessary forms, was, nevertheless, in its own
 nature flexible, highly convenient, and capable of being made to
 answer all the ends of justice. There was literally no form about
 it. The party stated his case, and asked the relief he desired; and
 the Court, if he proved his case, gave him that relief. Under this
 practice any suit for any kind of remedy may be brought. It was
 always quite easy, by bill in Chancery, to sue on a promissory
 note. Yet, as the English Court of Common Law had jurisdic-
 tion of the action, and Chancery had no jurisdiction where relief
 could be had at law, Chancery was never permitted to take cogni-
 zance of such cases.

"We adopted the old English forms; and hence we have at this
 day these two distinct forms of practice. He supposed they could
 be abolished, and one form made to answer every purpose. He
 thought the keeping of them separate was mischievous. In no
 country of Europe, except Great Britain, did these two separate
 forms exist: the Chancery, or civil law forms, obtained through-
 out the continent of Europe, over the whole civilised world,

wherever justice was administered in regular form. They obtained in Scotland for all the purposes of remedial justice. They were used for all these purposes in the state of Louisiana. In some countries of Europe, where the civil forms of practice obtained, and in Louisiana, they had the trial by jury in as full vigour as under the Common Law forms. That mode of trial was just as applicable, in civil controversies, in one form as in the other. The inconvenience of having these two forms of practice had long been felt here. In every state in the union, except New York, New Jersey, Maryland, and South Carolina, law and equity were now administered in the same Courts, although under different forms of proceeding. And even in the four states mentioned, and also in England, law and equity, in the last resort, was administered in the same Court. In Great Britain, the Court of Exchequer long had a law side, the same Judges administering both kinds of practice. Still, generally, they had been kept apart in that country as to the modes of practice. Efforts had been made in several states to bring these two forms together. An effort had been made in Pennsylvania; but there they took a course precisely opposite to that which good sense would have recommended. They attempted to make the fictions of the Common Law subserve all the ends of civil justice; and as those are utterly incompetent for this purpose, that state presented a very unfavourable specimen of the effects of endeavouring to administer civil justice in one form. His view was, that the forms of pleading used in Chancery, reduced and cut down to the extent they might be, were the true forms by which civil justice might be administered, in all cases, in one Court, and by an uniform mode of practice."

On the subject of the mischief of the Common Law division of action, the Commissioners observe: —

"Within some one of these forms of action, every injury to personal rights, which is the subject of legal redress, must be brought, and the failure to select the one which is strictly appropriate, is as fatal to the rights of the party, as his failure to sustain the merits, upon which his claim to redress is founded. There is no branch of legal science upon which so much curious, and we may be permitted to add unnecessary learning, has been expended, as in the attempt to define the precise boundaries which distinguish these various forms of action; and the absurdities by which their early history and their present retention are attended, are full of instruction as to the necessity for a deliberate inquiry into the propriety of their further continuance.

"From the period," they add, "of which we have been speaking,—a period comparatively benighted and ignorant, in all that is valuable in science,—to the present these forms have been adhered to with a sort of bigoted devotion. While the principles of legal science have expanded and adapted themselves to the exigencies of each successive age, through which they have passed, we find ourselves met with the standing argument against improvement, that the time-honoured institutions of ages must be held sacred; and that these forms, which may have been well suited to the age in which they originated, must be left untouched. Is there, in truth, any soundness in such doctrine? Can it be possible, that the progress which has characterised almost every age since that period, and which is the distinguishing feature of the present day, must stop in its application to the machinery by which rights are to be vindicated and wrongs redressed?"

And with their conclusion on this head, we must (for the present at least) conclude our notice of the contents of the code:—

"Let our Courts be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the question, whether the party has conformed himself to the arbitrary and absurd nomenclature, imposed upon him by rules; the reason of which, if they ever possessed that quality, has long since ceased to exist, and the continuance of which is a reproach to the age in which we live."

A few remarks on the practice enforced by this Code, and a few and very bald queries, we shall superadd, desiring our friends in America to look on them as felt to be crude queries merely, and asked with hesitation.

Are the Commissioners right in aiming at one uniform procedure? Is such a result desirable? The forms they have prepared of pleadings are not the natural language of a man complaining; why may he not complain in any form he pleases? The principle as to evidence, that none offered by either side should be rejected, but all taken for what it is worth, would seem to be equally applicable to pleadings also. Is it not well to leave an option to suitors as to forms and methods; and in this way will not there be room for an experience to arise as to which is best?

Again—if forms are to be laid down by some authority,

should the legislature deal with mere procedure at all? Should not the whole scheme be under the control of the Judges, and the responsibility of all forms thrown on them? To tell men, even though Judges, how, and how only, they are to do their work, is often to make them restive. At any rate, has not the legislature gone too much into detail? And should not the Judges have power by rule to vary any part of the act? Till after experiment, we do not believe anything can be predicated of procedure with certainty. The wise course seems to us to open as many roads as possible, and to let the suitors find the best. The speaker we have quoted seems to us to have indicated what is desirable for a practice: "There was literally no form about it." Our readers will observe that one remarkable effect of the amalgamation of jurisdiction has been, *ipso facto*, to make choses in action assignable.

No action is considered as commenced (so as to save the statutes of limitation, &c.) till process has actually been served.

Pleadings are all delivered, as with us at Common Law, and not filed as in Chancery. In this way a vast saving of expense will arise. When the parties on whom delivery should be made cannot be found, public advertisement suffices.

All discovery is enforced by interrogatory, which either party may exhibit for the other to answer without any cross suit for that purpose.

Query, have not the Commissioners improperly retained the present Common Law rules (barely, if at all, recognised in our own Equity Courts) as to defences which may be taken by demurrer, and which, if not taken, are waived? Why, if the plaintiff has no legal capacity to sue, or why, if there ought to have been other parties joined, is the objection ever to be held waived? Either full justice requires the observance of these rules or it does not. If it does, then why is it not observed, though the party omitted to demur? If it does not, such a rule should be repealed. Are not all the distinctions between demurrer and answer a part of the very metaphysical subtleties which the Commissioners have so ably

exposed? Is not the plan of Louisiana, in which the only pleadings are petition and answer, the right?

It seems to us, that the interest of the community at large in seeing the most perfect justice done in each case which is attainable, is not sufficiently borne in mind in the code. The value of all property, the rectitude of all fiduciary dealings, the moral character of a people, are deeply involved in the accuracy of the dealings of the Courts. It is a shallow error to think that the well working of courts of justice is the concern rather of the litigants than of the community. Had we Judges as perfect and inexorable as Minos and Rhadamanthus, and Courts as perfect, and a practice as free from special pleading, as the sub-mundane ones, how much would not such circumstances tell on the condition of us all — *non-suit* as well as *suit*!

No variance between allegation and proof shall be material (says sect. 145.) unless it has actually misled the adverse party to his prejudice. When will our Courts entertain this most obvious truth?

The code says (s. 208.) that in any trial of action for recovery of money or of specific real or personal property, where there is an issue of fact, it must be tried before a jury, unless the trial is waived by the parties, but that every other issue of fact is not to be so tried except by the order of the Judge. Query, if this distinction is founded on any real distinction; and if it is not inconsistent with the principle on which all the important changes of the code are based? The experience of our County Courts is relied on by the Commissioners. That experience is quite at variance with the distinction we remark upon.

The whole proceedings upon execution we consider open to grave question. Both here and in America we think the wrong principles in force. We think that justice requires that the only execution should be by bankruptcy; and that when, from the recusancy or incapacity of a debtor, the state steps in to enforce payment, it should seize his goods, for the benefit of all his creditors, not of the plaintiff only. The bankrupt law and the law permitting private and individual execution are irreconcilably at variance.

Upon the question of costs the views of the Commissioners seem to have great wisdom.

"We cannot perceive," say they, "the right of the state to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill or labour. Government is instituted for the preservation of order, and the protection of rights. It is not its province to make bargains for the people or to regulate prices. This it assumes to do, in respect to the dealings between lawyer and client. It fixes the price of skill and labour. It has no more just right to do this, than it has to fix the price of property: it may prescribe the salary of the clergyman, or the fee of the physician, with as much reason as the compensation of the attorney."

But the very able remarks of the commissioners on this subject we must postpone consideration of. The mischief of the scheme of paying by length they expose: "The system is wrong for two reasons; one that it encourages the multiplication of processes, and the other that it is not proportioned to the real labour performed."

The plan they propose as to costs against an adverse party, is to assess it by way of per-centage on the amount recovered; and they allow any bargains *bonâ fide* made between solicitor and client respecting the solicitor's remuneration.

Expressing, once more, our profound admiration of the labours of the Procedurists of New York, and of the ability and energy of the one individual to whom the whole is so mainly to be traced, we must for the present, at least, conclude this very desultory and we fear unsatisfactory notice, in the hope that we may some day resume the subject, and give, not merely a fuller account of their great work, but also the history of the agitation which led to its being ever undertaken.

- ART. XL — 1. *Report of the Committee of Management of the Metropolitan and Provincial Law Association, made to the Annual General Meeting, held April 19. 1848.* London, 1848.
2. *Memorial of the Metropolitan and Provincial Law Association to the Lord Chancellor, praying for Amendments in the Practice of the Courts of Chancery.* 1848.

IN our number for August last, we brought to the notice of our readers, as evidence of the progress of law reform, a society then recently established, and composed of attorneys and solicitors, having for their objects the promotion of the interests of suitors by the better and more economical administration of the law, and the improvement, intellectual and moral, of their own branch of the profession. The two publications which we have placed at the head of this article are proofs of the vigour with which the association have entered upon their important duties; the one being the Report of their first year's proceedings, and the other a Memorial which they have presented to the Lord Chancellor, suggesting improvements in the proceedings of the Court of Chancery. This last document we think deserving of considerable attention, as it relates to an important branch of law-administration, and proceeds from men conversant with the practice of the courts, and therefore familiar with what Lord Bacon calls the "stonds and impediments" which disturb the clear current of justice.

Before, however, we offer a few remarks upon the Memorial, we think it may be proper to say a word respecting the Annual Report of the association. This announces the fact that 913 solicitors have already enrolled themselves members of it, from which early encouragement it seems highly probable that it may become as important, from the number of its supporters, as it is for the purposes which it professes to advance.

We cannot help thinking that the rapid growth of this society is a proof that such an agent was called for by the

growing necessity of the times. The attorneys, as a body, may be said, until of late years, to have taken but a small share in the efforts made to improve the state of the law, contenting themselves rather with a passive acquiescence in reforms introduced by others, than in devising useful alterations themselves. This may be, in some measure, accounted for by the absence of that union among them, which is power. They were scattered and divided; acting for the most part, when they acted at all, as individuals, and of course with the weakness of individual effort. Of late, law societies have been formed in various parts of the country, at the head of which stands the Incorporated Law Society; and in addition to the force which mere concert affords, there has been an increasing intelligence among them, exciting attention to the necessity of disburthening the practice of the law from the clog of antiquated usages, and adapting it to the exigencies of an advanced condition of society. At present there are among the solicitors men, not only desirous of promoting reforms, but qualified to give valuable assistance in making those reforms beneficial.

The aim of the Metropolitan and Provincial Association, however, is not merely to simplify the administration of the law, but to protect that part of the profession to which they belong from aggression. The committee, in their Report, complain of various grievances which the solicitors have suffered, and under which they still labour, and they think the time has at length arrived when they should resort to measures of relief and self-defence. Whether this complaint be well or ill founded we cannot now consider; the subject, certainly a very important one, and as affecting a most respectable class of men entitled to grave attention, is too extensive, and perhaps too delicate, for us to discuss.

That our readers may have the means of weighing the merits of the alterations proposed in the Memorial, and that the society, on the other hand, may have all the benefit which they can derive from an exposition of their own views in their own language, we think it right to give this document at length.

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble MEMORIAL of the METROPOLITAN and PROVINCIAL LAW ASSOCIATION

Shews,—That the Metropolitan and Provincial Law Association is a society entirely composed of attorneys and solicitors in England and Wales (now consisting of more than 900 members), and that the objects for which it was formed are, the promotion of the interests of the suitors and the better and more economical administration of justice, the removal of the many and serious grievances to solicitors and through them to the suitors, and for maintaining the rights and increasing the usefulness of the profession.

That the members of this Society, and they believe the whole profession of the law, feel that the present system of proceedings in the Court of Chancery, and the mode of conducting business in its offices, is injurious to the suitors and the community; and they would earnestly impress on your Lordship the necessity of making extensive improvements therein, and beg respectfully to suggest some alterations and amendments which they are convinced could be readily accomplished and would prove highly beneficial.

That in the year 1840 a petition was presented to the honourable the House of Commons by a large number of the members of the profession, from which the following are extracts:—

“ That the delay and expence at present attendant on proceedings in the Chancery Court are so great as effectually to close its doors against all, except the richer classes of the community.

“ That the expence (which arises principally from the delay) is so serious as to render it imperative on the profession to prevent as far as possible the institution of suits for amounts much under 1,000*l*.

“ That, therefore, while at common law, rights of small amount can without impropriety be submitted to legal decision, a very large and important section of the community (*viz.*, persons interested in trust property of amounts under 1,000*l*.) are left without the protection of the law; and for them there is absolutely no Equity Court in operation.

“ That owing to this defect of our judicial institutions, not only is individual wrong inflicted without redress on this class of society, but frauds as to trust property, offences against the most

confidential relations, are actually encouraged by law, because permitted to pass with entire impunity.

“ That the Court of Chancery presents the single instance in the history of the country of a great national establishment, altogether stationary as to the number of those coming within its operation, the suitors of the Court having been as numerous 100 years ago as they are now; and that the defects of the Courts have, as your petitioners believe, become fixed, from the entire insufficiency of the institution to meet the wants of the people.

“ That your petitioners are convinced that no effective improvements can be introduced into the Equity Courts, unless the duty be assigned to the judges of superintending, controlling, and regulating the functions of the Court and of its offices, and that to impose such duties with effect it is essential that there should be given to the judges powers commensurate with them.

“ That your petitioners therefore appreciate as of the highest value the provision introduced into the bill now before your honourable House, giving powers for these purposes to the judges of the Court.

“ That as regulations of this kind require to be made with great deliberation, and of necessity must from time to time be amended, your petitioners would humbly submit whether these powers should not be permanent instead of being granted only for a short period of years.

“ That your petitioners humbly hope that, in the representations which they have made of the importance of rendering the proceedings in equity more expeditious and cheap, it will be felt by your honourable House that they are advocating improvements of the greatest importance to the interests of the suitors and of the community; whilst at the same time your petitioners freely admit that they believe these improvements will also in the end be advantageous to their own body, from the conviction that the interests of the solicitor is in all these questions identified with that of his client.”

That the bill referred to was passed, as your memorialists believe, in some degree in consequence of the facts stated in the said petition; and that though its operation was confined to five years, it has since been made perpetual, and that the Lord Chancellor with the concurrence of the Master of the Rolls and Vice-Chancellors, or any two of them, has now absolute power over both the practice and offices of the court; and as your memorialists would most humbly and respectfully suggest, the Lord Chancellor

has also thrown upon him a co-extensive responsibility of seeing that all proper and necessary improvements and alterations are made.

That though several useful amendments have been made under the said acts, yet that compared with the extent of the evil, they have been unimportant; and that your memorialists regret to say that the allegations of the petition alluded to are almost equally as true now as they were when the petition was presented.

That there are a great variety of matters which the experience of your memorialists as practitioners would propose for amendment; and that your memorialists would beg to suggest the heads of some of such matters, not presuming to enter into full details unless your Lordship should desire it.

That in these suggestions, and all amendments in points of *practice*, your memorialists would wish to take as a rule the plan of opening new methods of procedure without abolishing the old further than may be found to be essentially necessary; such new methods to be by way of alternative, and not by way of substitution, thus leaving it to experience to determine the comparative value of each method. They would also respectfully suggest that the practice of the common law courts in many instances might be usefully introduced into the Court of Chancery. (For instance, the present process of enforcing equity orders requiring so many repetitions of personal notice, frequently renders the process nugatory.)

That there is a great number of other matters which your memorialists could submit for the improvement of the procedure of the Court, but that your memorialists would beg in the first instance particularly to suggest the following amendments, believing them all to be of considerable value.

I. *With regard to Practice.*

1. That when all parties *consent*, the Courts of Equity should be at liberty to exercise a *jurisdiction on petition* in all cases whatsoever, so as to supersede the necessity of bill, answers, and evidence on interrogatory.

[Your Lordship's Act of last session, allowing trustees to pay money into Court, and then creating a jurisdiction on petition, has established the plan here proposed in those cases wherein the trustee hopes by partial submission to screen a breach of trust, and in which therefore its application was probably most questionable.]

2. That the practice of allowing *special cases* for the opinion of the Court, as established by Courts of Law by the statutes 3 & 4 W. 4. c. 42. s. 25., should be extended to Courts of Equity, in which Courts it is as much if not more needed.

3. As a consequence, that the practice of the Courts, compelling in all cases *enquiries for parties* or *taking accounts*, should be greatly modified.

4. That a primary jurisdiction should be given to the *Master* in all cases of *equitable account* in which the accounting parties consent to submit to such jurisdiction; and that such jurisdiction should be either *absolute* (except subject to an appeal) or a jurisdiction to entertain the matter without order of reference, but subject to *confirmation* and *further direction* by the Court.

5. The same principle may be usefully applied to all that class of cases in which a reference to the Master is almost of course, such as *compromising suits*; arrangements when the parties interested therein are not *sui juris*; proposals for *marriage of wards*, and for *sales by private contract, power for parties to bid*.

[The latter practice, first applied to the letting, setting, and managing by receivers, and lately introduced into lunacy and extended there, has been of great benefit.]

6. Also primary jurisdiction for the appointment of *new trustees* where there is no power of new appointment in the instrument creating the trust, or none capable of being exercised.

7. Also primary jurisdiction to *approve maintenance and guardian for infants*.

8. Also to grant *stop orders on funds in Court*; and to make such other orders as may be expedient in cases where parties consent.

9. To take the consent of *married women* to payments out of Court to their husbands.

[With regard to consent where married women or infants are interested, the Masters are by the present scheme of the Court peculiarly the parties to protect them; and your memorialists would propose that all consents for married women and children should be binding if the Master by his signature should sanction such consents.]

II. *With regard to the Despatch of Business in the Offices.*

1. To establish a thorough system of *supervision* of the offices, so as to detect delays and negligence there, and to supply to the

officer the present want of all motive to exertion ; and to secure that there shall be a sufficient staff in every department for the due discharge of the official business.

2. To require all *official documents* to shew on the face of them the *date* they were bespoken, and when delivered out.

III. *With regard to the Mode of transacting Official Business.*

1. To consolidate the record, affidavit, subpoena, and report offices, and provide that all documents now filed in the examiner's and register's office be filed there ; and to alter the practice as to filing records, pleadings, examinations, and affidavits, so as to establish one record office for the court in which the bill, answer, and all the other proceedings in one cause (not the bill and answer only as at present), including affidavits and other evidence, petitions, orders, reports, and all other official documents, may be filed chronologically in a separate and distinct form, or bound in a separate and distinct volume, and be so indexed by the name of the testator, as well as by plaintiffs' and defendants' names, that public reference may be easily had thereto.

2. To require *publication of accounts* at accountant-general's, similar to the unclaimed dividend account which Parliament has required from the bank of England.

3. To dispense with useless forms in the orders of the Court, and particularly with all *orders of course* (which in your memorialists' view, are not only indefensible but absurd), and also with all the ordinary directions repeated in all money orders — in all orders appointing receivers — in decrees directing usual accounts of testators' estates — for reserved biddings, and on sales, and to curtail the introductory part of orders on petition and motion, and on further directions.

4. To dispense also with a very great variety of other needless and expensive forms, at least when parties consent, such as production of original wills in Court, setting down causes, confirmation of reports, double or even treble petitions to get out of Court married women's monies, subpoenas to hear judgment, bills of revivor and common supplemental bills (where at law suggestions on roll answer the same object), &c. &c.

IV. *In the Subordinate Judicial Department.*

1. To authorize and direct the Masters *to act for one another in case of illness* or occasional absence.

2. As to the Taxing Masters, to apply the General Orders, 76th, of April 1828, and 76th, of November 1831, as to taxation, in case the parties differ (which order has practically been a dead letter, because the Courts or Registrar have not acted on it), to all cases of costs ordered to be paid by one party to another, and to require the Taxing Master in Equity to tax as the Common Law Masters do, without any order of reference, where both parties consent (extending the principle of 124th Order of May, 1845.)

V. As to the Banking Department of the Court.

1. To require (as was done under the Slave Compensation Act, and is done in Ireland) the Accountant General to invest and accumulate dividends from time to time, when once ordered (without application by the parties from half-year to half-year.)

2. To dispense, as is done by Accountant-General in bankruptcy, with powers of attorney (which are only necessary to pass legal estates), and to require him to act on letters or such other authority as may be sufficient in law to bar the party, the solicitor of the party verifying such authority.

[According to the present practice there is no evidence given to the Accountant-General that the party signing the power is the party entitled to receive the money under the order.]

3. To allow money to be *paid into Court* (as the Courts of Law do) without any order, and also to be invested, as is now done with money paid in under the Legacy Act.

4. To have the orders on which Attorney-General acts, or an office copy of them filed with him.

5. To remove the great hardship on parties, arising from Canterbury probates and administrations being always required for the Accountant-General.

6. To get a branch of the Bank of England established in Chancery Lane for the convenience of the suitors, in the same way as has been done at the Court of Bankruptcy.

VI. As to Evidence.

1. To enact the common law rules as to admission of documents.

[Rules to this effect were prepared many years ago by members of your memorialists' body, and submitted to, and are still in the hands of the Judges.]

2. To enact rules to make the giving of evidence compulsory in

bankruptcy and other cases where proceedings are on petition, by allowing exhibition of interrogatories or *viva voce* examination.

3. To extend the appointment of Masters Extraordinary to London, and to reduce the fee on the appointment of a Master Extraordinary.

4. To allow affidavits to be used on the hearing of causes ; at least subject to the discretion of the Judge.

And your memorialists would further respectfully state that the body of solicitors are anxious to give every assistance in their power to your Lordship and the other Judges in improving the Court of Chancery.

It was formerly the practice of the Judges of the Court to consult the six clerks and clerks in Court as the solicitors and representatives of the suitors of the Court, on all changes in practice ; and your memorialists would, lastly, very respectfully submit to your Lordship, on behalf of the suitors of the Court, that it is now, since the abolition of that office, due to the suitor, that the solicitors of your Lordship's Court, as the members, and the only members of the profession personally known to, and the parties personally selected by the suitors of the Court, and the only parties personally intrusted by them as their confidential agents, should in future be consulted on such changes.

Your memorialists pray that, if the duties of your Lordship will permit, you will be pleased to investigate the matters of this memorial, and will receive a deputation of your memorialists thereon ; or that you will appoint other parties to investigate the same and report thereon to your Lordship, and if your Lordship shall see fitting, that your Lordship will intrust them to carry out the objects of this memorial so far as the same shall appear wise and desirable.

Signed, on behalf of the Association,

JOHN S. GREGORY, <i>Chairman,</i>	} <i>Vice-Chairmen.</i>	} <i>Members of the Equity Sub- Committee of the Association.</i>
JNO. J. J. SUDLOW,		
JNO. HOPE SHAW,		
EDWIN W. FIELD,		
M. D. LOWNDES,		
G. BOWER,		
THOS. HOLME BOWER,		

One of the most important changes proposed is also the first which is adverted to in the memorial, — the giving the Court jurisdiction upon *petition* when the parties consent.

Whenever rights are withheld, or require to be ascertained

and established, and the occasion arises for calling in the aid of courts of justice, we apprehend it is the duty of every free state to take care that the subject is provided with a mode of proceeding which shall combine at least two elements—cheapness and efficiency. As to the last requisite, there will be no dispute; no one doubts, that, if the law speaks, her voice should completely, as well as authoritatively, conclude every question. There are some alarmists, however, who look with terror upon what they call *cheap law*; as if litigation were a sort of luxury, which, if placed within the reach of all ranks of the community, would be indulged in to excess. But litigation, even if the cost were much more moderate, will always be too costly to be resorted to as a means of pleasurable excitement, or an instrument of oppression. If a poor man have claims founded in justice, his remedy should be open to him—not locked up by a barrier of heavy expense. If his claim be unfounded, he will find few advocates willing to run the risk of bringing it forward. We are inclined to hold as very light the dangers of increased litigation from a reduction of price.

The proceeding by petition will, beyond all question, be comparatively inexpensive. In many cases it will be, if not a better, at least an equally available proceeding. The facts can be as easily stated as upon a bill, and much more concisely—and the evidence more readily and satisfactorily adduced; but we think that the giving of *evidence* in support of the petition must be made compulsory. Although the parties interested may be desirous of that mode of proceeding, some person capable of giving evidence material to the case may withhold it; unless there be means of enforcing such testimony, the whole may be rendered abortive. Nor do we see any sufficient reason why a witness should not be compelled to give evidence, either in writing or orally, in this case as well as in any other.

The memorialists suggest that *special cases* for the opinion of Courts of Equity should be allowed in analogy to a similar practice in Courts of Law. This, again, appears to us a means of obtaining an equitable construction of instruments or circumstances which ought to be adopted. The object of

the suitor is often simply to ascertain the opinion of the Court upon a particular point, without being encumbered with the whole apparatus of a suit, as he now frequently is — he has occasion for a chaise, why should he be compelled to take a waggon? For instance, the trustee of a fund is desirous of distributing it; he is withheld by some obscurity in the will or settlement; all that he requires is a judicial decision, perhaps upon a single point, which shall indicate the parties entitled to the property, and shield the trustee from personal responsibility in paying it over to them. By means of a case all this can be effected. There will not be the least occasion for bill, answers, evidence, or preliminary inquiries. How much of expense, and time, and useless labour in the Master's office, would be saved, in the case supposed (and others might be mentioned), is perfectly obvious.

It is not our intention to go through all the particular suggestions contained in this paper; some of which have already been laid before our readers. We have given them an opportunity of examining what is proposed by the Association; and we have reason to believe that the subject has attracted the favourable attention of the higher authorities of the Court. It will probably undergo further inquiry, which, we trust, will result in such alterations in the present practice as may relieve the solicitor and the Court from many obstructions which now beset them, and the suitor from much fruitless and unprofitable expense.

Before we conclude, it may perhaps be useful to notice an inaccuracy into which the memorialists appear to have fallen. The power of the Equity Judges to make rules for the regulation of their Courts, which was conferred upon them, by the 3 & 4 Vic. c. 94. for a period of five years, is not made *perpetual* by the act of 4 & 5 Vic. c. 52.; but was, by that act, enlarged only for a further term of five years, which will expire in 1850. It can scarcely be expected that all the reforms that may be usefully introduced into the Court of Chancery can be effected in so short a space of time as barely two years, and therefore the proper means should be taken to extend the act for a further period — or, what is better still, to make it perpetual.

**ART. XII. — FRENCH REPUBLIC — DEMOCRATIC
LEGISLATION.**

SINCE our last number, events of serious import and of great moment have succeeded each other with unusual rapidity in the neighbouring nation. Our business here is not with the political aspect of affairs either in France or elsewhere. Our concern is with the Laws and their changes. But the late events have materially affected the Jurisprudence of our neighbours, and, as such, they demand our attention.

The Provisional Government forced into existence by the Revolution of February, was tolerated from the fear of anarchy. "There must be some Government," all men cried out. "Any thing is better than anarchy." Yet anarchy they did not avoid by embracing imbecility and corruption. "Any Government is better than no Government at all," said they, forgetting Mr. Coleridge's answer which he applied to Popery, when it was said, "Any religion is better than none,"—"You may as well say, 'Any oil is better than none,' and pour oil of vitriol in your salad; or 'Any sugar is better than none,' and stir about sugar of lead in your tea." We must fairly own that the Provisional Government disposed us to treat them with the same parable; for surely, so imbecile a Government, one so little capable of meeting the difficulties of its position—nay, so disposed and so powerful to intrigue and to job for its own personal advantage, so little disposed and so impotent to provide for the safety of the State,—could hardly have been supposed possible, above all, in a time of revolutionary ferment, when the dregs being thrown up to the surface, the good (with the bad) have a chance of coming into the light and into the public service. Not a man of any capacity had appeared under the service of these Provisional persons. They were themselves, with the sole exception of M. Arago, the greatest name in European science, persons of trumpery qualities and most superficial

accomplishments. Some, as Marie, and Albert, and Goudchaux, were utterly obscure. Some, as Lamartine, were mere frothy wordy declaimers;—he a middling poet, a second-rate romancer, a wretched historian, a statesman of the very lowest caste, a politician of neither steadiness nor consistency. There was Louis Blanc, too, a wild half-crazy theorist, holding by his blundering follies with a fanaticism inconsistent with even a moderately sound understanding. There was also Ledru Rollin, a man tainted with the general suspicion of dishonest courses; a notorious insolvent, charged by his creditors with acts that deserved the visitation of the penal laws, and so bent upon violent courses, that all men saw his object to be the revival of the Reign of Terror and the bloody times of the Convention.

If some of the acts of this provisional government deserved commendation, the bulk of their proceedings were worthy of all censure. They sent to the provinces young zealots of their own creed, whom they directed to rule with a rod of iron, and, disregarding all laws, all rights of persons, to be a law unto themselves. Nay, Ledru Rollin issued a circular calling upon them to assume dictatorial powers, and to act upon the vile, the atrocious principle, that whatever they deemed the public good, that is, the interest of the Republican Government, required, they were entitled to do. A young briefless lawyer, twenty-three or twenty-four years old, called Olivier, was sent on this mission to Marseilles, the second or third mercantile town in Europe; and there he was thus installed as proconsul, with dictatorial power, in the very place where the name of Olivier was odious; because his father, called Demosthene Olivier, a few years before, had committed a notoriously fraudulent bankruptcy.

A son of M. Arago was sent to Lyons to domineer; and there he issued an order that all travellers should be robbed on the highway (that is, at the Barriers) of whatever cash they carried above 500 francs; the specie being wanted for the bank circulation, and the traveller's cash replaced by worthless bank of Lyons paper. He, also, with his council, compelled the general commanding the troops to obey the dictates of the drunken mob that had seized the fortress, and

give up the keys of the powder magazine, which might well at any moment have exploded and destroyed half the city. Characters of the like kind were sent elsewhere; and this by the very men who had complained so bitterly of Louis Philippe's nepotism, because he gave a military command to one of his family!

The abolition of colonial slavery was the next *provisional* measure, and evidently a clap-trap; because the very bond of the usurping government's existence was never to be still for a moment. To be sure, anything so absurd as making a *provisional* measure of that which, once decided, could not possibly be revoked, or even modified, never was conceived by a disordered imagination. The approaching National Assembly might have unanimously disapproved of the emancipation — all France might have joined all the planters in calling for its abrogation; but in vain; the word had gone forth, "*volat irrevocable*;" and the Negroes were of course free, and for ever. All slaves were taken from their masters, and no compensation whatever was given, or even dreamt of, to their owners for this pillage of their property. England, for 800,000 slaves emancipated, had paid twenty millions of indemnity to the colonies. France, for 300,000, should have paid seven or eight millions. Has she? — Has she promised it? — Can she? Where is that most insolvent of states to find one-tenth part of the money — aye, or one twentieth?

The abolition of capital punishments for all political offences was another of the *provisional* measures; that is, a total change in the criminal law, and one made without the least regard to the principles of criminal jurisprudence, with as little regard to the best interests of society, and made in terms of which the vagueness and the indistinctness mocked all comprehension, while the utter want of definition made this crude act of legislation despicable in every sense. If all capital punishments are to be abolished, then, of course, political offences should not be made an exception. But as for murder and other acts of sanguinary violence, the French criminal code retains the punishment of death; nothing can be more inconsistent with principle than excluding such offences as high treason. That is the greatest crime which

can be committed in any society; for it implies the imminent risk of civil war and the certainty of confusion; so that all crimes come within the scope of treason. Moreover, while other crimes excite disgust or scorn, or abhorrence—for example, murder—treason has no such tendency, and therefore requires to be stamped with the especial reprobation of the law. But, again, though we know rebellion or treason generally to be within the description of political offences, who shall define the bounds of that class in particular? Can any man tell us whether killing a person in a brawl is murder or a political crime? whether firing at a soldier to create a mutiny is political? whether poisoning the wells of an adverse faction's troops is a political offence or a common murder? Nor can a reason be discovered why foul murders should cease to be deserving of death, because committed with a view to overthrow the established government, and to involve the country in a civil war. So crude a piece of legislation we will venture to affirm never proceeded from any human lawgivers, at least in a civilised state.

The next act of the Provisional men was to convoke an assembly of delegates from all the workmen, under the silly, visionary Louis Blanc. This notable parliament of ignorant men discussed endlessly, and never came to any point. They gave audiences to civic deputations, and made numberless speeches in answer to numberless addresses. The multitude soon grew tired of them, and then waxed wroth at their folly, their vanity, and their impotence, till Louis Blanc dared no longer show himself in the streets, for fear of being torn to pieces by the labouring part of the people, whose idol he had so lately been.

All this while there were at Paris 120,000 unemployed workmen, partly the offscourings of the streets of that huge and corrupt metropolis, partly labourers out of work, partly masons, attracted by the fortifications, and thrown idle on that costly work being finished. It happened that these multitudes had arms in their hands, and they were deaf to all the entreaties of the Government imploring to lay them down. For it is only by entreaty that these vigorous rulers ever attempted to exercise any power of directing public affairs. Their entreaties were in general disregarded, and

the multitude remained armed, ready for mischief, but, above all, hungry, and accordingly thirsting after plunder.

The Provisional Government now issued orders for electing 900 representatives by Universal Suffrage. The instructions which accompanied this decree of election are deserving of some attention. There issued from the department of M. Carnot, Provisional Minister of Public Instruction, a circular wholly unexampled in even revolutionary annals. Let the Commissioners, says the minister, bearing, as he did, one of the most illustrious names in modern history, the name of a great statesman, and a great philosopher,—let the representatives of our Republican Government, in all the departments, says the Minister of Education, see that the voters choose good and sufficient representatives, but don't let them choose men because of their learning, or reject men because of their entire ignorance. "A man," says the Educational Minister, "may be an excellent deputy who can neither read nor write." These were the very words used in this utterly incredible circular. "A man wholly without education may be able to vote, by saying aye or no, as well, very possibly better, than well educated men." And to what task did the choice of electors commission the representatives? To neither more nor less than the most difficult task which mortal man can undertake—the framing of a new constitution for the greatest state in Western Europe—to govern the people most hard to rule and controul and superintend! Happily this instruction was not acted upon, any more than the kindred and contemporary instruction of M. Ledru Rollin—to choose men who were prepared to go all lengths, and restore the sanguinary Reign of Terror. Men were, generally speaking, chosen who had some capacity for affairs. But the object of M. Carnot's instructions was too apparent, as was the object of M. Ledru Rollin's. Both ministers desired—the Provisional Government desired—to pave the way for an unrestricted power, vested in themselves, by returning a majority of ignorant men, tools in their hands; and as the payment of twenty-five francs a day, a larger sum by six times than any working man could earn, enabled the common day labourer to betake himself to the speculation of being elected deputy; no doubt the Provisional Government expected that a majority of deputies,

too ignorant to think for themselves—of too humble station to be independents—would be elected, and be convenient tools in their hands. This expectation was frustrated, and M. Carnot could not cause the return of the ignorant any more than M. Ledru Rollin could cause the return of the Jacobins and Terrorists.

As the meeting of this National Assembly approached, it might have been expected that a merely provisional government, usurped by a few men, and submitted to from a necessity real or supposed, would have interrupted its legislative labours, and that it would have made no decrees which absolute necessity did not demand, and demand for a few weeks, until the Assembly could meet. The levying of a tax no less than 45 per cent. of the land tax seems hardly to fall within this description. But such a tax was illegally exacted. An attempt was soon after made to confiscate all the railways in France, because, ready money being above all things needful, the government could, by this act of spoliation, obtain an ample supply of that much-wanted article. Any measure less provisional and more outrageous cannot well be imagined. But the contempt into which the government had fallen, and the great alarm which this threat spread over the country, proved obstacles not to be got over, and the measure of wholesale robbery was therefore postponed, after its author, M. Garnier Pagès, had in vain attempted to force it on his colleagues, and through them on the people.

But however fit it may seem that there should be a pause in the conduct of the government, and that no change in the law should be made until the National Assembly had met, and a government be rightfully established, the Provisional men found that for them there was no rest—they must keep moving, else their whole authority, which was little, their power, which was less—was gone, and their existence must cease. Therefore new measures were absolutely necessary to keep them even nominally in existence as a government—and measures of a gaudy, popular, mob-courting nature. Their next measure was exactly of this description, and it was of the very worst possible character. They declared that permanent judges—that is independent judges—are

inconsistent with a popular government; that a republic cannot stand with a due administration of justice; that the judges must be mere tools of the multitude, and administer the law under the mob's control. Therefore all judges whatever were to hold their offices during pleasure, and be chosen by the people for a term of three years, and no longer.¹

¹ We are now happy to find, that equally decided disapprobation of this un-called for measure has been expressed by our highly respectable contemporary journal, the "*Revue de Legislation et de Jurisprudence*," in its number for April; and the following short extracts may probably be acceptable to many of our readers, and are due in justice to the able and learned lawyers by whom that periodical publication is conducted, and who are distinguished alike by their spirit of independence and the soundness of their views.

After applauding the generous thought which dictated the abolition, by the Provisional Government, of the punishment by the public exposure of the person of the delinquent, the reviewer adds, "But, on the contrary, we cannot admit with M. Cremieux, agreeably to what he has said in another decree, that the non-removability (*irremovibilité*) of judges (or, as we would say, the tenure of office by judges *ad vitam aut culpam*) is a principle irreconcilable with republican government. This is to cut, or decide prematurely, and in terms too absolute, one of the gravest questions with which the National Assembly is going to be occupied."

In his article in the number for April on "The Judiciary Organisation," M. Feraud-Giraud (for, in this Review, the author of the article uniformly sub-joins his name) observes as follows:—"Under the Constituent Assembly, the judges were nominated only for four years; but from the year VIII. (1800) the Constitution conferred on them non-removability. This security, in 1810, alarmed the ambitious views of the emperor; then it was menaced, with our liberties. Since that time, we have constantly succeeded in obtaining that it should be written in all the documents which, in our history, have marked the triumph of national liberty. Well, now again we are called upon to proclaim liberty, with the Republic; that is to say, the triumph of the laws over men. Shall we cease to write justice in our institutions? We shall do so, if we efface the non-removability of the civil judge.

"In the sitting of the first Floreal, year VIII. (1800), citizen Abreal said, when installing the Court of Cassation, 'Renewals too numerous, too frequent, and near each other, cause to be lost sight of the spirit which has dictated the first decisions; individual opinions succeed each other; arbitrary will or administration takes the place of jurisprudence; and soon there is no longer any thing certain and steady. . . . You will escape this inconvenience by the perpetuity of your functions; you will again find always in your decisions the same spirit, the same wisdom, because you will be always yourselves, and the motives or reasons which shall have guided you will be always present to you. I shall not speak of the discouragement which was always felt when the moment of change approached; I shall not speak of the effects which the predominance of parties, fear, or hope, might produce on movable functionaries. From this time forward, assured of their lot or condition, the organs of the law, devoting

Of this monstrous outrage on all principle we spoke at length in our last number ; and we need say no more now except to express our great satisfaction that further reflection, coming in aid of our plain remonstrance and solemn warning, have already rescued France from the shame of this obnoxious and despicable decree — as it has rescued the ministry from the taint communicated to it by the authors of the two famous circulars already referred to. The new Constitution presented to the National Assembly remedies for the mischief complained of: the judges are to be no longer appointed by the people; no longer to hold office for a limited period; no longer to be removable at any one's pleasure. This is a most gratifying result of discussion even under the evil sway of the multitude.

The National Assembly has met since we last commented on French affairs, and especially on the Jurisprudence of our neighbours. The result of Universal Suffrage has certainly been far more favourable to that scheme than either its admirers had expected, or its adversaries feared. An assembly of men respectable in station has been chosen; all the more eminent members of the former Chamber, who deserved to be returned, are named as deputies; and though we very deeply grieve to see neither the names of Broglie or Molé¹, nor of Guizot among those elected, we have Thiers, Berryer, Odillon Barrot, as pledges that all is not abandoned to the poor creatures, or the shameless jobbers, or the silly romancers, or the half-crazy enthusiasts of the Provisional administration. This Assembly has been engaged in examining the Constitution; and, though nothing can be more crude or less well considered, or more inartificially framed, than the plan proposed by the Provisional Government, it will apparently undergo ample and even calm discussion.

But early in the session there had been a measure of importance adopted, which materially affected all the proceed-

themselves to study, to meditations which they will have no reason to dread they have undertaken in vain, will be enabled to add each day new knowledge to the treasures amassed by long experience.'"

¹ Since writing this, M. Molé has been returned.

ings of the new Assembly. An Executive Committee was appointed of five members, to replace the Provisional Government, which laid down its usurped office, and to continue administering the public affairs in concert with the Assembly, until the new Constitution should be framed, adopted, and put in motion. It is gratifying to observe, that, at the head of the votes for these high stations, stood, by a large majority, M. Arago, by far the purest, and incomparably the most eminent, of the Provisional Government; while at the foot was M. Ledru Rollin, become so universally odious and despicable, that he was nearly excluded altogether; and next to him stood M. Lamartine, whose most suspicious coalition with that too notorious individual had, in the space of one week, deprived him of all the fleeting esteem which his speeches had gained for him, and which he held on the most insecure of all tenures, that of popular favour. However, this new executive was installed, and proceeded to show itself the worthy successor of the Provisional men, heirs to their impotency and their inaction, save when mob applause was to be gained.

The first occasion in which this was made manifest was the 15th of May. A mob collected and proceeded in great numbers to the assembly, attacked it, cleared its hall of all the members, drove the president from the chair, proclaimed a new Provisional Government, and proceeded to the Hotel de Ville and the offices of the ministers, to seize on those seats of executive power. The general commanding the national guards, General Courtois, failed in discharging his duty. But others came with military assistance; the rebels were defeated, and the Constitution restored. But so grievous an insult, so easily perpetrated upon the constituted authorities, especially on the representatives of the people, could not fail to make the executive government the laughing stock of the world; and the tenure by which tranquillity was holden, and the defence by which the existence of any government whatever was secured, appeared manifestly feeble and uncertain, and indeed contemptible in all men's eyes. Nevertheless, although the general was displaced, and many of the rioters were sent to prison, and inquiries were instituted into the origin of the rebellious movement, the Executive Committee

remained in the office, of the duties of which they had been proved so flagrantly incapable. The consequence of this forbearance on the Assembly's part speedily became manifest. But before that appeared clearly, grave suspicions were generally entertained of two members of the Executive Committee. Among those arrested were Barbes, Blanqui, and others of the Communist or Louis Blanc persuasion; and M. Ledru Rollin was not understood, nor perhaps M. Lamartine, to be altogether unconnected with these things. The suspicion may very possibly have been groundless. The popular indignation was chiefly pointed against Louis Blanc, who had been once the mob-idol, as member of the Executive Committee.

The consequences of such a wholly imbecile executive were soon apparent. The unemployed workmen amounted to thousands and scores of thousands; they were armed, and they were hungry, and they were desperate; for the plan of feeding so many men had proved impracticable in the bankrupt state of the finances, and it became absolutely necessary to withhold much of the assistance heretofore given by the state in the form of paying a large body of men and of employing workmen in the *ateliers nationaux*—workshops in which goods were manufactured which no one would buy—workshops on the principle of Louis Blanc. The first burst of indignation, occasioned by withholding the means of subsistence, was directed against that wild and sanguine creature. His person was no longer safe among the multitudes, so lately his servile admirers: the wild beasts whom he had tamed by feeding them resumed their ferocious nature as soon as their food was withheld. But the whole system—to give it, from mere courtesy, such a name—was the object of their furious attack; and as all the thieves, and pickpockets, and murderers—all, in short, who compose the felon population of Paris—eagerly joined the starving workmen—a formidable body was soon collected; so that on the 24th of June the fuel, long collected, burst forth in a flame, and Paris was involved in massacre. The object of the plot was to pillage that wealthy capital; and it had very nearly succeeded. Under very wary and experienced leaders, one of whom appears to have been a

colonel, lately secretary of the ministers, barricades were constructed so solidly that no artillery could destroy or shake them; every station of importance in a military view was garrisoned; not only armed men filled the houses near each barricade, but guns were placed on each great station; and the regular army, aided by the national guard and the new force, or *garde mobile*, were for the first day kept at bay by the insurgents: nor was it till the commanding officer, to whom dictatorial powers were given by the Assembly (superceding the incapable Committee), had increased his force to nearly 40,000 men of the regular troops, that the rebellion was, after four days' hard fighting and with the loss of at least 12,000 lives, put down. Paris was declared in a state of siege for many days.

It was now that men saw the absolute necessity of displacing the wholly incompetent Executive. It was removed amidst shouts of indignant scorn. Nor could any one believe that there was not guilt as well as imbecility at the bottom of the late perils. How otherwise explain their supineness while all the preparations were making, arms collecting, even guns planting and barricades of stone-masonry erecting? How explain this passive inaction without supposing something like complicity? Accordingly, the most odious of the late executive, M. Ledru Rollin, is strongly suspected of having had some fellow-feeling with the insurgents. The charge may be groundless, and his after-conduct may help to repel it. M. Lamartine, the most despised of the late executive, is, we verily believe, falsely suspected; but he has now fallen into general contempt. We have said that the Executive Committee succeeded to the Provisional Government's known imbecility. It also inherited their love of jobs. Nothing more odious was ever seen than the nomination to high places by both the Provisional men and the Committee. Not only near relations were appointed, but men marked with galley-slave punctures on the shoulders were appointed to important stations in the public service. The police department is positively affirmed to have recognised the bulk of those promoted, as formerly under their surveillance for persons suspected of frauds and other disreputable offences. One

diplomatic appointment of a prompter to a second-rate theatre, and keeper also of a brothel, has been the subject of question in the Assembly, and no denial could be given. In short, there was of necessity a change of the whole set, and without making any distinction. The Assembly removed them altogether, and gave the executive power to General Cavaignac, a sturdy republican, but an able officer and honest man, who had put down the insurrection with much skill and vigour, ably and bravely aided by General Lamoriciere. The title given him was President of the Council, and he named for his ministers a number of men little known to the public, but among others M. Carnot, too well known. This gentleman's appointment excited universal disapprobation, and he very soon had a vote of the Assembly passed against him for the foolish and culpable act of circulating a book containing the worst doctrines of the Communist party. He immediately resigned, and will probably be no more heard of. His conduct has been a mixture of folly and violence; nor — painful as is the admission extorted from us — can he be acquitted of all charge of bad faith; for his celebrated circular in favour of ignorance was said by himself and by his friends to have been obtained from him in ignorance of its purport, and issued under his name and without his consent. Yet he never dismissed the under-secretary who had so unwarrantably abused his confidence, and never publicly retracted the circular itself. Hence men not unnaturally supposed that he was favourable to the measure, and willing to take advantage of it without incurring the shame of having been its author or approver. As M. Carnot inherited a great name, without any of the talents or scientific acquirements that illustrated it, we are disposed to account for his conduct, in both the affair of the scandalous circular and of the Political Catechism, by supposing that his judgment is inferior to his probity, and so to vindicate the moral at the expence of the intellectual character of the man.

The Republic is now engaged in framing its form of Government; and surely a more difficult task never was attempted by man. The character of the French people — the peculiar nature of the Parisians, above all, a body so powerful, influencing all the measures of the Government,

and, indeed, the fortunes of all the nation — the experience of the changes, so numerous and so extensive, that have happened within the last sixty years — the various parties of conflicting sentiments that divide the people — the fact of a Republic being unavoidable in a country where there are really no Republicans — the equally undoubted fact that the legitimist party is headed by persons of no mark, and by a prince without issue — the certainty that the dynasty of 1830 is without any considerable party until the abdication of Henry V. shall take place¹—all concur to render the framing of a Constitution a work of stupendous difficulty in every view that can be taken of it.

As yet only one point seems to have arisen for much discussion — the question of a second Chamber. On this most important subject we entertain a very decided opinion. Without a revision in a second chamber of all the legislative acts done by the first — a revision by men whose number and qualification and election are very different, and make them a body with different habits and interests — no reasonable security can be obtained for due deliberation, for avoiding the numberless evils of haste and hazard, for securing all interests in the community. Even the model republic of North America has found this provision necessary; and the daily experience of England bears ample testimony to it. The House of Lords has, not once, but many times, saved our monarchy and saved the country itself. The existence of a legislative body which may, like the National Assembly of 1792, in one night, by a dozen votes, alter the whole institutions of the country committed to its care, appears to us a legislative nuisance rather than a mere political anomaly.

¹ The late insurrection completes the ex-king's justification for not attempting to destroy the rebellion, when in February he had only 28,000 soldiers in a circuit of twelve miles' diameter, and the national guards deserted him. But had he succeeded by force, how many weeks could he have held a throne raised on the ensanguined foundations of what would have been called a selfish and royalist massacre, had blood been shed to save his crown? while if shed by the chiefs of a republic, it passes by the name of a necessary act of security for the people. We cannot dismiss this topic without paying a just tribute of praise to M. Thiers's honest resistance of the flagrant attempt at open robbery of the royal family, lately made. M. Thiers, in preventing this act of plunder, has saved the French nation from one of the foulest stains that ever disgraced a people.

Meanwhile, who can look to France, and expect stability for any system framed and adopted by the present National Assembly? There is a bare majority in support of the Government—a bare majority, perhaps, for the existing order of things. Such a Government can have no vigour, no self-confidence. It can inspire no confidence in others. It is only a stage of the process of transition through which France is going in all her concerns—her legislation, her economy, her policy, her existence.

We cannot close this article without noticing the sad effects of economical theories upon the peace of society. Never was this evil more strikingly exemplified than during the last four months at Paris. Wild speculations of ignorant and unthinking men have been set afloat and let loose upon the people. The great body of workmen, who constitute the mass of every people,—men whose subsistence depends entirely upon the labour of their hands, and who have, in reality, the deepest interest in the security of all property being preserved sacred and inviolable,—have been bewildered in the romantic theories of merely speculative reasoners, have been taught to dispute on the foundations of society, made to believe that they are entitled to share the capital of their employers, and invited to swallow the too-pleasing dogma that labour is a suffering with which they should no longer be afflicted, that enjoyment is theirs by right, that subsistence has no necessary connection with the sweat of their brow. We have read the tract of Louis Blanc, entitled “*Organisation de Travail*,” of which thousands have been circulated at the low price of nine-pence (one franc), and the nonsense of which has been largely devoured by the people. It is by no means the most extravagant preaching lately seen of unsound and popular doctrine, yet it goes a pretty considerable length. It lays down broadly that every man has a perfect right to receive five francs (four shillings) a-day for eight hours’ work. It further declares that the idea of literary property is an impiety; that all reading men have a right to profit by all writing men’s ideas; and that the books of all authors should be published by the State at the public expense, while the writers should receive from the State a remuneration

for their labours, according to their several merits. This is pretty well; but M. Prudhon goes a step beyond it, and declares all property to be a public robbery, all division of the soil a usurpation, all separate ownership of capital an act of spoliation. This doctrine was embodied in M. Carnot's Catechism for Republicans, and circulated at the public expense. The vote was refused, and he properly and usefully resigned; retiring into that private station for which alone he was by his capacity fitted, and to adorn which his unquestionable virtues well qualified him.

Now the Provisional Government were from the first well aware that all this was folly and falsehood, and that it was of the most mischievous tendency. Yet it meanly refused to dissent from such wild and such utterly false doctrines, and in order to court the multitude it even encouraged them. The result was the involving their finances in hopelessly inextricable embarrassment, and then the rebellion, first of the 15th of May, then of the 26th of June. Louis Blanc and his coadjutors have thus, by the criminal connivance of the executive government, been suffered to perpetrate these offences against both reason and property and life—against peace and order: to involve the capital in blood, and to endanger the very existence of civil society. For their madness is not confined to Paris—we fear not even to France.

For let us here pause to reflect, that these men have imitators, and even matches, among ourselves. Those in England, who from motives of blind zeal and a misguided humanity interfered with capital and labour, and obtained laws to work out their senseless theories, are truly smitten with the disease that has involved Paris in confusion, and made its streets flow with blood. It is most devoutly to be hoped, that what has lately passed in that unhappy capital will prove a salutary warning to our dealers in mock humanity and false sentiment here; and that we shall all open our eyes to the truth, so much contemned of late, and be at length persuaded, acting upon the persuasion, that the interests of society, above all of the working classes, are only safe while the state leaves capitalists as well as labourers at entire freedom in the management of their own concerns.

We have in this article confined ourselves to French law and French affairs; but the revolution of February has extended its baleful influence across the Alps and the Rhine. Indeed the confusion had begun in Italy before February but the events of February have made it "worse confounded." In Germany all is unhinged and unsettled. Not only Prussia, but Germany and Austria herself, so averse to change, have thrown off their allegiance to old institutions, and to the absolute sovereigns who administered their powers. Nay, the parliaments which have been convened are upon the bad, flimsy French model, and not on that which the happy experience of many centuries has recommended to England. Universal suffrage, which produced little mischief in France, where the people had been long accustomed to elective assemblies and to elective procedure, was adopted in Germany, where no election of any kind (except that of the Emperor, chosen by seven or eight princes, under the old empire) had ever been known; and the whole people were for the first time called upon to choose deputies by the votes of every person twenty-four years old. The result has been, in Prussia and Austria, the return of ignorant peasants and a few petty tradesmen. To the Austrian national assembly of between 600 and 700, have already been deputed 300 Bohemian and Gallician peasants, many of whom cannot read, and more of whom cannot write. They are to meet in a single chamber and to found a new constitution for the monarchy! It is not doubtful that the remaining deputies, those for Austria, Styria, the Tyrol, will be chosen from the same classes; though the nobles and other landowners may not everywhere be so generally rejected. All good sense showed the expediency of Germany following the English rather than the French examples. The wildness of theory and the violence of faction have perverted the minds of the people everywhere, and we wait with much anxiety, and with more apprehension than hope, the approaching result of this unreflecting experiment on national happiness and the peace of the world.¹

¹ We have been truly astonished to see the Edinburgh Review treat these great questions in a spirit of such unthinking violence and with such gross ignorance of the subject. A late article of this once celebrated journal is truly

SELECTION OF ADJUDGED POINTS¹

[REPORTED SINCE 1ST NOVEMBER, 1847.]

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- I. POINTS IN THE LAW OF PROPERTY, p. 429.
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COURTS.		REPORTERS.
Master of the Rolls	- -	9 Beavan. Part 2.
V. C. of England	- -	15 Simons. Part 1.
V. C. Knight Bruce	- -	1 De Gex & Smale. Part 1.
Exchequer	- - - -	5 Meeson & Welsby. Part 4.

I. POINTS IN THE LAW OF PROPERTY.

1. Lease — Forfeiture — Election — Waiver. 2. Title — Leaseholds for
Lives — Conditions of Sale.

1. JONES V. CARTER, 15 Mees. & W. 718.

Lease — Forfeiture — Election — Waiver.

It is well established, that where a lease contains covenants on breach of which the lease is to become void, the effect of such covenants is to give the lessor *an option* of determining the lease

pitiable. Abandoning all the opinions so well known to every one but those writers,—the opinions of Romilly, of Macintosh, of Grey, of Holland, of Horner, (to say nothing of living authorities,)—this Review actually declares that Sardinia holds Genoa by the free consent of the people! Let the ignorant men who thus presume to misstate known facts, only read the parliamentary debates of 1815, 1816, 1817, and they will find that the gravamen of the Whig charges against Lord Castlereagh and the Congress of Vienna was the handing over Genoa to Sardinia, against the will of the people. The equally false statement in defence of Charles Albert, that the greater part of the charges usually brought against him are calumnies, strikes the reader with astonishment at the audacity of the writer. It seems the treachery and cowardice which makes the leader of a conspiracy betray his associates and abandon his dupes to destruction, for the security of his own person and for his own advancement, forms no serious charge in the estimation of this thoughtless author.

¹ We are obliged to reduce the Adjudged Points to a more limited space in this Number.

upon the happening of a breach. The lessee has obviously no such right, as it would enable him at any time wilfully to create a forfeiture, to the prejudice of the landlord. The landlord, then, having this option, may, without doubt, waive a forfeiture incurred by breach of covenant, and may, by subsequent acceptance of rent, or other acts indicating an election to acknowledge the lessee as his continuing tenant, maintain the lease in subsistence. The case before us, however, is of the opposite character, and the question was, whether certain acts or proceedings of the lessor, after breaches of the lessee's covenants, did not amount to an election to determine the tenancy. Certain mines in Carnarvonshire were, by deed of 16th Sept. 1844, demised by the plaintiff to Carter and Foster for fourteen years at a yearly rent of 50*l.*, and subject to royalties on the ores. The deed contained a covenant for payment of the rent, and divers other covenants, on breach of which the lease was to be utterly void. The plaintiff, in 1846, brought an action of covenant for arrears of the rent; and the defendant pleaded, that at the time laid in the declaration there was not, and had not since been, any rent in arrear. Upon this plea issue was joined; and the defendant proved, that in May, 1845, the plaintiff had commenced an action of ejectment against him for breaches of several covenants in the lease, and had served a declaration to which a plea had been pleaded in that action. It was thereupon contended by the defendants, that the service of the declaration, and the subsequent proceedings in the ejectment, amounted to an election by the plaintiff to consider the terms as determined, and to treat the lessees as trespassers. Parke, B.: "Though the lease is declared to be *void* for breach of covenant, it is perfectly well settled that the true construction of the proviso is, that it shall be void *at the option* of the lessor (*Rede v. Farr*, 6 M. & S. 121.; *Doe v. Banks*, 4 B. & A. 401.) ; and consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined. In the cases above referred to, the option was held to have been exercised by the receipt of rent subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered *void*, it could not again be set up. An entry, or ejectment on which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry.

Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease, which is made *void* at the option of the lessor, we need not determine, because an ejectment was brought and proceeded with to the consent-rule, by which the defendants admitted an entry; and the entry would certainly be an exercise of the option; and once determined, the lease could not be revived. . . . But, even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease, and the option must be exercised once for all. . . . After such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty after that time. We are all, therefore, of opinion that the lease was determined [by the ejectment brought] in May 1845; and, consequently, the defendants were not liable to pay the subsequent rent or damages for any subsequent breach of covenant."

2. HODGKINSON v. COOPER, 9 Beav. 304.

Title — Leaseholds for Lives — Conditions of Sale.

Upon a sale of leaseholds for lives held under St. John's Hospital at Bath (an Eleemosynary Corporation),¹ the title shown commenced with an indenture made the 17th July, 1815, whereby in consideration of a surrender to the hospital of a former lease of the 8th August, 1769, for three lives (of which one was then dead), and to which surrendered estate Henry Knight was stated to be entitled, the corporation granted to Knight, his heirs and assignees, for three lives, a house and premises at Bath. This leasehold interest of Knight became vested in the vendors, who had stipulated by the conditions of sale that they were not to be called upon to show *the landlord's* title. The purchasers required proof of the title of Knight to the surrendered estate, created by the deed of August, 1769, and forming the consideration for the lease of 1815. They also required evidence of title for sixty years past, on the ground that the last lease was a renewed lease from the corporation in consideration of the surrender of the former lease. The vendors resisted these requisitions; and the Master to whom the title had been referred reported against it. The law upon this

subject is laid down by Sir E. Sugden with his usual clearness and exactitude in the following terms:—"When a lessee sells, he produces an abstract of the subsisting lease and subsequent instruments. This is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waived calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease; and by means of this reference the chain of title is kept up. The reference in the last lease to the one immediately preceding is notice of it to the purchaser; and that again is notice of the one before that, and so by steps to the first lease. And if in any of these leases the lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to enquire into the title. Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them."—(Sugd. V. & P. 494. 11th Edit.). The case of *Cooper v. Emery* (1 Phill. 388.), was also relied upon by the purchasers, in which Lord Lyndhurst decided that notwithstanding the stat. 3 & 4 Wm. 4. c. 27., a vendor is still bound to show a sixty years' title, even of leaseholds. And in accordance with these authorities the Master of the Rolls held that the vendors were bound to show the title of Knight to the surrendered lease of 1769. Lord Langdale, M.R.: "Owners of property of this description are in a very unfortunate situation, and are exposed to difficulties in selling, which ordinary vendors are not subject to. I regret it; but I have no power or authority to remedy the inconvenience. It appears that the grant (of 1815) was made in consideration of the surrender to the corporation of a former lease granted by them in August, 1769. . . . It is therefore said that the title of Knight as surrenderor of the old lease is part of the title now under consideration. It has been also argued here, and I have heard nothing to the contrary, that when you have a grant to a man and his heirs for lives, the title must be made out in the same way as the title to property held in fee simple; and I am very much afraid that one of the objects of the legislature in passing the Act of Limitation referred to, namely, that of shortening the period of deducing titles, has not been effected, in con-

sequence of the construction put upon that statute. We have therefore to consider the title of Knight to the lease surrendered, which connects the previous title with the subsequent lease of 1815; and all we have is this,—the fact that he was considered by the lessors entitled to a legal right to the surrendered lease and the possession. There is nothing more, and this is not enough. It appears from the lease of 1815 that there was a former lease, and between the grant of the first and second leases there was a period of about forty-six years, and nothing is stated of what was done during that period. It may be possible that the vendors might be obliged to go to a very great and unreasonable extent if the same rule be followed up; and it may happen that leases prior to the lease in question may be so connected with leases preceding them, that it may be found impracticable to make out the title; but that by no means necessarily follows; for when you go to a certain extent back, the Court necessarily resorts to favourable presumptions arising from the facts brought before it. My opinion is, that the plaintiffs are bound to make out some title in Knight, the surrenderor of the former lease, and that it would not be consistent with my duty to disturb the Master's report, finding that a good title has not been made out."

POINTS IN EQUITY.

1. Trustee Act — *Casus Omissus*. 2. Practice — Partition — Powers of Commissioners. 3. Pleading — Personal Representative. 4, 5, 6, 7. Practice — Injunction — Piracy — Design — Specific Performance — Dismissal of Bill — Costs — Special Retainer — Counsel's Fees — Security for Costs — Laches. 8. Trustee — Duty of Accounting — Costs.

1. *HEMING V. ARCHER*, 9 Beav. 366.

Trustee Act — Casus omissus.

Lands of the testator in the cause having been sold under the decree for payment of debts, the purchaser objected to complete his contract. It appeared that the trustee under the will had disclaimed, and the estate had become vested in the testator's heir during the life of one Joseph Archer, on certain trusts; but the *legal* remainder stood limited by the will to the children of Joseph Archer (who was still living, and had four infant children) as tenants in common. It was therefore contended that no effectual conveyance of the legal estate could be made to the purchaser, as

the case did not fall within the statute (1 Wm. 4. c. 4. s. 12.) empowering the tenant for life to convey the fee ; and under sect. 11. the infants could severally convey no more than what they could have conveyed without order if they had been of full age, viz. their prospective shares as members of a class as yet incomplete and unascertained in point of number. Lord Langdale, M. R. : "My impression is, that this matter can only be set right by an Act of Parliament. No conveyance can be made of these estates until the class of children has been determined ; and that cannot be ascertained until the deaths of their parents."

2. MOLE V. MANSFIELD, 15 Sim. 41.

Practice — Partition — Powers of Commissioners.

The commissioners under a decree for partition having awarded certain sums to be paid for owelty of partition, the Vice-Chancellor of England held that they had no power to do so.

3. JOSSAUME V. ABBOTT, 15 Sim. 127.

Pleading — Personal Representative.

The personal representative of John Stiles being a necessary party to this cause, the pleader alleged that John Stiles made his will, and appointed Richard Stiles his executor, and that Richard Stiles proved the will in the Prerogative Court of the Archbishop of Canterbury, and afterwards died, having made his will, and appointed Nathan Stiles his executor ; and that Nathan proved his will in the *proper Ecclesiastical Court*. To this bill there was a demurrer for want of parties, on the ground that the allegation of Nathan having proved Richard's will in the *proper Ecclesiastical Court* was not sufficient to show that Nathan was the personal representative of John Stiles ; and, in support of the demurrer, it was argued that the allegation did not warrant the Court to infer that Richard's will was proved in the Prerogative Court, which was necessary in order to make Nathan the personal representative of John. The Vice-Chancellor of England being of that opinion allowed the demurrer, but gave leave to amend the bill.

4. GEARY v. NOERTON, 1 De Gex & Smale, 9.

Injunction — Piracy of Design.

The V. C. Knight Bruce held in this case, that although the defendant had admitted the commission of a piracy of the plaintiff's registered patterns of shawls, and had verbally promised to discontinue the sale of the spurious article, and to pay the costs incurred by the plaintiff in filing his bill and preparing his affidavits, the plaintiff was still entitled to bring his cause to a hearing, so as to obtain the protection of an injunction, and was not bound to rely on the defendant's verbal promise to abstain from further invasion of the plaintiff's rights. His Honour also gave the plaintiff his costs of suit.

5. MALDEN v. TYSON, 9 Beav. 347.

Practice — Specific Performance — Dismissal of Bill.

The purchaser of an estate having filed a bill against the vendor for a specific performance of his contract, it turned out, that the vendor had a bad title. Lord Langdale, M. R.: "My impression is, that in such cases the bill is dismissed *without costs*. I think that this is now become the rule." Bill so dismissed accordingly.

6. NICHOLS v. HASLAM, 15. Sim. 50.

Practice — Costs — Special Retainer.

The plaintiff in this suit, which was instituted in Chancery for the infringement of a patent, employed as his counsel the then Attorney-General (Sir William Follett); and, on a motion made in the cause, in 1843, after the Court had risen for the long vacation, he paid the Attorney General fifty guineas by way of special retainer, and also thirty guineas with his brief. The taxing master allowed these fees in taxation of the costs, upon which the defendant presented a petition for a review of the taxation, on the ground of the impropriety of specially retaining a counsel, not usually practising in Chancery, and at a time when (as it was proved by affidavit) several Queen's counsel, who did so practise, were in town. The V. C. of England: "The objection is not that the fee is excessive, but because an eminent counsel was employed who did not practise in this Court. If the

objection was to the counsel, it ought to have been made at the time. I think that a most serious blow would be aimed at the liberties of the people of England, as represented by counsel, if I were to interfere in this case. Every suitor has a right to choose his own counsel; and if the plaintiff in this case thought proper to employ the first counsel at the bar of either court, my opinion is, that he had a right to do so." Petition dismissed with costs.

7. RUSSELL V. NICHOLS, 15 Sim. 151.

Practice — Costs — Counsel's Fees.

The costs of this suit, which was instituted for the administration of a testator's estate, having been decreed to be paid out of the estate, those of the executors were ordered to be taxed as between solicitor and client. It appeared that the executors had procured the attendance of counsel, before the Master, in support of a claim to be allowed certain disputed items in their discharge: but in taxing the costs the Master disallowed the fees of the counsel so employed. The executors filed a petition, praying that the Master might review his report, and contended, that under the 120th general order of May, 1845, the costs in question were properly allowable, as costs of the attendance of counsel before the Master on questions "relating to *title*," which expression, it was argued, did not mean merely title to real estate. But the V. C. of England held that the suggested construction of the word *title* did not accord with the sense in which that word was used in the general order; and his Honour decided that the Master was right in disallowing the costs in question.

8. PLAYER V. ANDERSON, 15 Sim. 104.

Practice — Security for Costs.

The plaintiff described himself in the bill as of No. 13. Bury Street, St. James's, where he was actually residing: but he was merely a lodger, and he removed from thence about a fortnight after the filing of the bill. He then went to Paris, then to Carlisle, and next to Bath, where he was stated to be residing with his relations. The defendant moved that the plaintiff might be ordered to give security for costs; and the V. C. of England so ordered, on the ground that the description of the plaintiff in the bill, though literally true, did not furnish the defendant with the useful or effective information which he was entitled to require from the plaintiff respecting his residence.

9. DORIN v. HARVEY, 15 Sim. 49.

Practice — Specific Performance — Laches.

The vendor of an estate having filed a bill against the purchaser for specific performance of his contract, suffered nearly a year to elapse after the answer was filed, without taking further proceedings in the cause. On his then moving for the ordinary reference to the Master to inquire into the title, the V. C. of England, on the ground of the *laches*, refused the application.

10. ATTORNEY-GENERAL v. GIBBS, 1 De Gex & Smale, 156.

Trustee — Duty of Accounting — Costs.

The trustee of a parochial charity refused or omitted for twenty years to render any account of his administration. On an information being filed, the accounts were taken, and a balance found in his favour to the amount of 500*l*. Knight Bruce, V. C.: "However morally just may be the trustee's claim to that sum, I am of opinion he must lose it. In this case there was a trust to apply annual receipts to annual payments. There is neither fund nor personal liability for reimbursing [the trustee] the excess of past annual payments over the past annual receipts: he must therefore lose the amount. . . . There is no satisfactory explanation why twenty years elapsed without the trustee exhibiting his accounts: though the select vestry did not ask it, the trustee ought to have produced them, the parishioners having a right to information on the subject. He must pay the costs of all parties up to the hearing."

NOTE TO ART. VII., No. XV.

As our supposed case of Mr. White, in the article on the Inns of Court in our last No. (pp. 156, 157), has been mistaken for the actual affair of 1832, which is said to have led to Mr. Hayward's exclusion from the Bench, we beg leave to say, that we had no intention to pass any opinion on that affair, or make any statement regarding it. So far as the circumstances have come to our knowledge, it appears to have been settled honourably for both parties at the time; and our arguments were exclusively directed against a system, which avowedly recognises the right of indulging private resentments or dislikes in the administration of a public trust.

POSTSCRIPT.

THE last three months have been more than usually productive of projected law amendments; and if the present session will show but little carried, yet assuredly the seed is sown and the harvest will next year be plentiful.

On the 12th of May last, Lord Brougham brought the whole subject before the House of Lords in an elaborate and powerful speech, which we recommend to the careful perusal of our readers, it having been revised by the noble and learned Lord, and published by Ridgeway. On the present occasion we must content ourselves by giving the following analysis which is prefixed to it, by which it will be seen how wide a field it embraced. It is divided into five heads:—

I. Law-makers.

1. Qualification of Electors
2. Qualification of Members.
3. Election Practices.
4. Election Committees.

II. Law-making.

1. Departments.
2. Amateurs.

Results.

Four Principles of Statute-making.

Breach of these.

- i. No Reference to former Acts.
- ii. No Reference from Clause to Clause.
- iii. Alterations in passing.
- iv. Seven Rules of Statute diction.

Breach of them.

- v. Interpretation Clause.
- vi. Elaborate Absurdity.

Private Acts.

Remedies.

- (1.) Drawing Board.
- (2.) Private Bill Court.
- (3.) Judicial Committee.

III. Law—made.

Defects removed since 1828.

Defects remaining.

- i. Criminal Law—Fines.
- ii. Evidence—Parties—Libel.
- iii. Status—Marriage—Divorce—Legitimacy.
- iv. Mercantile Law—Insolvency.
- v. Law of Real Property.
 1. Want of Declaratory Action.
 2. Limitation.
 3. Rules of Construction.
 4. Length of Deeds.
 5. Want of Registry.
 6. Insurance of Title.

IV. Law—published.

Digest—1. General.

2. Statutory.

V. Law—administered.

Four Rules for Judicial Tribunals.

Breaches.

- i. Justices and Colonial Judges.
- ii. Chancellor and Masters.

Defects in Master's Office.

1. References excessive.
 2. Warrants.
 3. Payment of Salary.
 4. Examinations.
 5. No power of Administration.
- iii. Expense of Appeals to Parliament.
 - iv. Small Legacy and Small Debts Jurisdiction.
 - v. Public Prosecutor.

Conclusion.

The proceedings in the House of Lords have been otherwise extremely interesting to the friends of law amendment upon the two important bills presented by Lord Brougham, the one for a Criminal Code, the other for a Code and Amendment of the Bankrupt Laws. These measures were both referred to Select Committees, and considerable progress has been made in both. Lord B. has reported from the Criminal Code Committee that they had met and proceeded with the subject. They had circulated the Bill and the proposed Digest, with

papers pointing out what changes it proposed in the Criminal Law, and with complete sets of the Reports of the Commissioners, on which the Digest is founded. These were circulated among the heads of the Law,—that is, the learned Judges of the three kingdoms, and the Inns of Courts in London and Dublin, and Faculty of Advocates in Edinburgh, and their remarks and suggestions were requested. The Report then states that the pressure of Judicial business prevented the possibility of answers being returned during the present session, and therefore the Committee recommend the Lords to postpone the further proceeding with the Bill till next session. They, however, also recommend that the Government be called upon, without further delay, to perform the promise made in June, 1816, by the Crown, in answer to the joint and unanimous address of the two Houses of Parliament. That promise, hitherto unaccountably forgotten, was of great importance. It was to cause the whole Statute Law, civil and criminal, to be digested and arranged under convenient heads; omitting, of course, all temporary acts, private and local acts, and acts relating to the revenue. A digest of the whole General Statute Law will thus be obtained, and no better help to the General Digest, of common as well as statute law, can be conceived. We must observe, in passing, that had the Law Amendment Society existed during the interval between 1816 and our day, this strange neglect to perform so very important a promise never could have taken place. We shall now have this great benefit conferred on the profession and on the community. Lord Brougham had given notice of a motion to this effect on the 12th of May, when he presented the Digest of Criminal Law, and made the speech already referred to in this Number. But he afterwards recollected, apparently, the proceedings of 1816, and must have found the address, with the answer to it, on which his committee have concurrently acted.

The Bankrupt Law Committee is now proceeding to examine all the proper evidence on that great and interesting subject; and Lord B. has stated in the Lords that he, as their chairman, had adopted the course of having the several witnesses—as the Bankrupt Commissioners and the

mercantile men who petition for a digest and for a change of the law of debtor and creditor — all present during the enquiry. The petition was presented, in an able and candid speech, by Lord Wharncliffe, chosen, since Lord Ashburton's lamented decease, as the representative of those respectable petitioners. Lord B. stated on that occasion that the petition being referred to the Committee, the course above pointed out would be taken; and any alterations in the lately introduced system, such as the expenses of its working, suggested, might then be maturely examined, and, if approved, adopted. But he gives no hopes of his agreeing to restore arrest on mesne process, although that subject might, among others, be examined.

Thus the principle of codification has at length received the formal sanction of the House of Lords. It only remains well and maturely to work it out, and it is plain that this will be finally accomplished next session.

We have been favoured by one of the County Court Judges with the following observations on a recent return to the House of Commons respecting the County Courts: —

“The return, as to the County Courts, which comprises a period of nine months only, made upon Mr. Granger's motion, is extremely defective in showing the true result of those Courts. It appears not to have been adverted to when the motion was framed, that the judgments of the Courts, in numerous instances, direct the debts to be paid by instalments. The consequence is, that the return shows only the amount of the sums actually paid upon the judgments up to the 31st of December, 1847, without showing the very large sums that remained unpaid, and which have been since in a course of payment; and this has led to the making, from the return, very erroneous calculations as to the expense of the Court, by assuming that the costs incurred produced no more than the sum appearing in the return. To supply this defect, I have obtained a return from my Court at ———, which correctly shows, up to the 31st December, the amount of the sums sued for, and the sums remaining to be paid on the 31st December, upon the judgments obtained prior to that day.

“ The result, from the ———— return and the Parliamentary return, is this : the plaints entered were 589 for sums amounting to 1997*l.* 5*s.* 9*d.*, of which plaints there were tried 406. The judgments upon these plaints were, for sums including costs, amounting to 1519*l.* 3*s.* 4*d.*, of which, paid into Court prior to the 31st December, 801*l.* 6*s.* 8*d.* and remaining to be paid on that day, 717*l.* 16*s.* 8*d.*; and which last mentioned sum has been since in a course of payment, and it may be assumed that upon the plaints not tried, being 189, there was paid a very considerable sum.

“ To recover these sums, including the costs paid upon the 183 untried plaints, the costs were as follows : —

		£	s.	d.
“ Judge	-	122	15	6
Clerk	-	103	5	3
Bailiff	-	104	14	1
General Fund	-	74	17	6 ¹
		405	11	10

“ Omitting the general fund fee, upon the above 589 plaints, the average costs of each, for the fees of the judge, clerk, and bailiff, is 1*l.* 2*s.* 2½*d.*

Assuming the amount of the general fund to be a proper charge to be continued, the expense of the Court is about 20 per cent. upon the sums recovered. Omitting the charge for the general fund, the expense is about 16 per cent.

“ In the parliamentary return it appears as if, for the above costs, 405*l.* 11*s.* 10*d.*, the only sum actually recovered had been 801*l.* 6*s.* 8*d.* It appears, by the Parliamentary return, that up to the 31st December the total number of plaints issued had been 429,215, of which there had been tried 267,445, leaving untried 168,770, taking a fair criterion; and there does not seem any reason for supposing it to be otherwise, of the sums for which in all the courts judgments

¹ The general fund is levied for building Courts, &c. and is 6*d.* between 20*s.* and 40*s.*, and above 40*s.* 5 per cent. ; so that if the plaint is taken out for 20*l.* the suitors pay 1*l.* to the general fund, and the aggregate of the Judge's clerks and bailiff's fees then paid is 7*s.*

were obtained upon the plaints tried. Then as at ——— 406 tried plaints have produced 1510*l.* (omitting fractional sums); these 267,445 plaints produced 1,000,613*l.*; including the costs, which would fall upon the party withholding a just demand; and deducting from that sum the aggregate amount (appearing by the Parliamtary return) of the judges', clerks', and bailiffs' fees; and for the general fund being 255,436*l.* (omitting fractions) leaves recovered by the suitors 745,177*l.* in nine months, instead of 345,122*l.* (omitting fractions) mentioned in the return. This calculation, be it observed, treats the whole of the costs as if they were all properly attributable to the tried plaints; but part of them was borne by the untried plaints, and were for ejectment cases, the benefit of which is not estimated in money.

"There, besides the sum of 745,177*l.*, then remains to be added to it such sums as were paid upon the 168,770*l.* untried plaints. Moreover, from the statement made by some of the clerks of the Courts, there is reason to believe the debts paid without the intervention of the Courts, but, from their having been established, exceeds the amount of the sums for which the plaints are issued.

"To contrast the costs in the County Courts with the costs in the Queen's Bench, I have obtained a copy of a taxed bill of costs in a cause of *Mills v. Mills*, in an action for a debt under 20*l.*, which was undefended. The plaintiff's costs, omitting the costs of witnesses, were 13*l.* 0*s.* 3*d.*"

The Incumbered Estates Bill, to which we have frequently adverted¹, has been the subject, in the present Session, of many most interesting and important debates in the House of Commons, in which the principles for which we have from the first contended have been admitted by all, but more especially by the Solicitor General, Sir James Graham,

¹ See the series of articles on Irish Land Measures, 5 L. R. 398., 6 L. R. 165., 7 L. R. 163., and *antè*, 229. It will be seen that the new bill is founded very much on the principles we have recommended, except that it is not to be worked by Commissioners, which we much regret. We think, however, we said rightly, in our last number (p. 226.), that "the battle-field in conveyancing reform was to be fought in Ireland."

Mr. Osborne, and Lord Lincoln. We have already in this Number alluded to this (pp. 255, 256.), and we might greatly lengthen the list of extracts. At the time this is written, the bill has been read a third time by the House of Commons, and has gone up to the House of Lords for their assent to the alterations made by the former house. These are very important, and, as far as they go, we, on the whole, approve of them. They enable parties to dispense with the Court of Chancery altogether, and we need not say that this has our entire approval (see *antè*, p. 229.). It is proposed to be enacted, that after giving certain notices in gazettes and newspapers, and also *personal*¹ notice to the remainder-men, that land may be sold, either by tenants having particular estates or incumbrancers, and the purchaser shall acquire a title against all the world, on the expiration of five years after he has paid the purchase-money into Court. Now we think this bill must be treated, as Lord Lincoln said, echoing the words of the Solicitor-General, as the first great step towards the emancipation of the land; and as such we gladly take it. We think, however, it will be found that it is only a step. It was necessary in this case to take a bold course;—we believe the circumstances would have justified even a bolder. The only rational hope for Ireland is to develop her real riches, for the benefit of her own sons—to make known the real uses of land, and thus to find in her own soil subsistence and maintenance for all. We think it will be found that this cannot be done either through the Court of Chancery, or, we fear, by the unassisted landowner; but that he must be aided by some competent assistance. We do not, however, press this now—we are too glad not only to get the true principles admitted, but also a measure which, sooner or later, must be made effectual for the purpose. There is clearly the will; and if this bill is not the true way, it will now, we are satisfied, be discovered. We should therefore be deeply grieved if, by any untoward accident, the bill should, after all, be lost in the present session. We hope, therefore, we shall have it in our power to examine its

¹ This we think the most doubtful part of the whole plan.

whole bearing and operation on Conveyancing Reform, as well in England as in Ireland, in our next number.

Some progress has also been made with another important measure connected with land, which also shows the remarkable change which, within the last few years, has come over the minds of landowners, and their wish to accomplish its entire freedom; we allude to the enfranchisement of copyholds. In their sixth report (1847), the Copyhold Commissioners recommended the introduction of the compulsory principle, by allowing any tenant to obtain a commutation of all manorial incidents, or any of them, on application to the Commissioners, who were to determine the proper consideration. A bill founded on this report was introduced by the Lord Chancellor, and was read a second time on the 22d of June last, after a debate, by a majority of nearly two to one. This led to a meeting of lords and stewards, held at Gray's Inn Coffee House, on Wednesday, 5th of July, at which, among others, the following resolution was come to: "That the abolition of copyhold tenure is a matter of public importance, and that it is the desire of lords of manors, and of the stewards, to assist in any proposal for such abolition, provided it is based on principles of justice." On the bill afterwards coming on for committee on the 6th of July, a wish for a more extensive measure being expressed by many influential peers, more especially by the Duke of Cleveland, the Earl of Stradbroke, and Lord Wharnccliffe, the Lord Chancellor agreed to postpone further proceedings till the 17th, when very extensive alterations were introduced, giving much larger powers to the Commissioners, and proceeding on the principle of an entire extinction of the tenure. We are not without hope that, considering the very general feeling in favour of the measure, some progress may be made in this most important measure, even in the present session. As it is, there can be no doubt that the recommendation of the Select Committee of the House of Commons, of August, 1838, will be speedily realised.

As we do not doubt that this Bill will be interesting to our readers, and being a Lords' Bill it cannot easily be procured, we shall give an analysis of it:—

Provisions for a general Enfranchisement.

- On application of lord or tenant, and after inquiry, commissioners may make order of enfranchisement, sect. 1, 2.
- Provisions for appointment of valuers on behalf of lord and tenants respectively, and of an umpire; 3—15.
- Powers for valuers to examine witnesses and enter land, 16—18.
- Valuers to make declaration before acting; 19.
- Valuers to frame schedule of valuations; deposit for inspection; amendment and confirmation thereof; 20—23.
- Matters to be taken into consideration by valuers in fixing amount of compensation for enfranchisement; 24, 25.
- Provisions enabling purchase by lord of land proposed to be enfranchised in certain cases, and charge of purchase money on the manor; 26, 27.
- Commissioners may stay proceedings for enfranchisement in certain cases; 28.
- Valuers to fix nature and particulars of compensation; 29.
- Commissioners may postpone commencement of consideration; 30.
- Compensation for stewards' fees; 31.
- Valuers to frame award; deposit for inspection; amendment and confirmation thereof; 32—34.
- Provisions relating to compensation monies; 35—44.
- Commissioners may correct errors, with consent; 45.
- Award to operate as conveyance of enfranchised lands; 46.
- Land awarded to lord to be conveyed to uses of manor; 47.
- Provision as to payment of monies in cases of disability; 48.
- Recited Acts to apply to enfranchisements under orders; 49.
- Custody of court rolls; 50.
- Apportionment of monies, and payment of expenses; 51, 52.
- Lord may recover fines, &c. due before award; 53.

As to Enfranchisement by Agreement.

- Provisions of former Acts authorizing a general commutation by agreement between lord and three fourths of tenants extended to a general enfranchisement by a like agreement; 54.
- Considerations for, effect and consequences of, such enfranchisement; 55—57.

As to Commutations and Enfranchisements.

- Enfranchisement or commutation may be for rent-charges or fines fixed (instead of being variable as tithe rent-charge); 58.
- Instruments of, to be conclusive; 59.

Provision for apportionment of considerations ; for joint lords ; and exceptions out of the operation of the act ; 60—62.

Copies of award, &c. to be evidence ; 63.

Commissioners may make rules and orders ; 64.

Interpretation of terms ; 65.

Provision for fixing and taxing stewards' fees ; 66, 67.

Incorporation with former acts ; 68.

Short title ; 69.

Act may be amended ; 70.

We add one or two of the most important clauses.

" I. That any lord or tenant of a manor may apply in writing to the Copyhold Commissioners to inquire into the expediency of enfranchising the lands holden of such manor ; and upon such application the Commissioners, by themselves or an assistant Commissioner, shall by such ways and means as to them shall seem proper, inquire into and ascertain the expediency of such enfranchisement, and shall, if they shall think fit, issue an order under their seal for the enfranchisement of the lands, or of any portion of the lands, holden of such manor ; and the Commissioners may, by such order of enfranchisement, or by any subsequent order under their seal, fix reasonable times within which respectively the valuations for the enfranchisement shall be completed, the schedule thereof framed, and the award made by the valuers, and may from time to time, by like order, extend such respective times : provided always, that it shall be lawful for the said Commissioners, at their absolute discretion, to withhold any such order of enfranchisement, or, upon cause shown to the satisfaction of the Commissioners, by order under their seal, to exempt any portion of a manor included in an order of enfranchisement from enfranchisement under such order, and also from time to time, by any such order as aforesaid, to postpone the enfranchisement, or the consideration of any application for the enfranchisement, of any manor, or portion of a manor, for such period as they shall think expedient."

" XXX. That it shall be lawful for the Commissioners in every case where they shall be of opinion that a present increase of payment in the way of rent-charge or interest would create hardship or inconvenience to such of the tenants of a manor as shall not have been applicants for an order of enfranchisement, by the order of enfranchisement or any subsequent order to direct that the commencement of all or part of the rent-charge (if any), or of all

or any part of the interest on the principal sum (if any), which shall be the consideration awarded to be paid by each such tenant, shall, unless such tenant shall otherwise request or consent, be postponed until the next act or event on which a fine or other such manorial right would have become payable or due to the lord if the land had remained unenfranchised: provided always, that all quit-rents, and other periodical payments, shall in the meantime, until the commencement of such rent-charge, or of such interest which shall have been postponed as aforesaid, continue to be paid to the lord, and the lord shall have the same remedies for the recovery thereof as if such land had not been enfranchised, unless the same shall have been compensated by some portion of rent-charge or interest, or gross sum, of which the payment shall not have been postponed; and the valuers shall in every case, where the commencement of all or any part of the rent-charge or of the interest on the principal sum shall have been postponed as aforesaid, take such postponement into account in fixing the amount of such rent-charge or principal sum.

“XXXI. That in all enfranchisements under this act compensation shall be awarded to be paid for all fees, dues, and other payments usually paid or allowed to stewards and other officers of the manor, and for the loss which such stewards and other officers may sustain by such enfranchisement, and that whether such stewards or other officers shall hold office by patent or otherwise howsoever; and it shall be lawful for the Commissioners to make out and fix, and from time to time alter and vary, a scale of fees, dues, and other payments, to be paid or allowed to stewards and officers for the purpose of fixing such compensation, and such compensation shall be included in the award herein-after mentioned, and shall be paid to the steward by the tenants at such time or times as the Commissioners, by any general orders or otherwise, shall direct.”

Considering, then, that an act for gradually assimilating the law of entail in Scotland to that of England has been passed, we have, in behalf of the conveyancing reformers of all three countries, to thank the present Government for their successful exertions to improve the law of property. To these measures we hope to add in the next session a complete revision of the Stamp Laws, so far as they affect the transfer of land.

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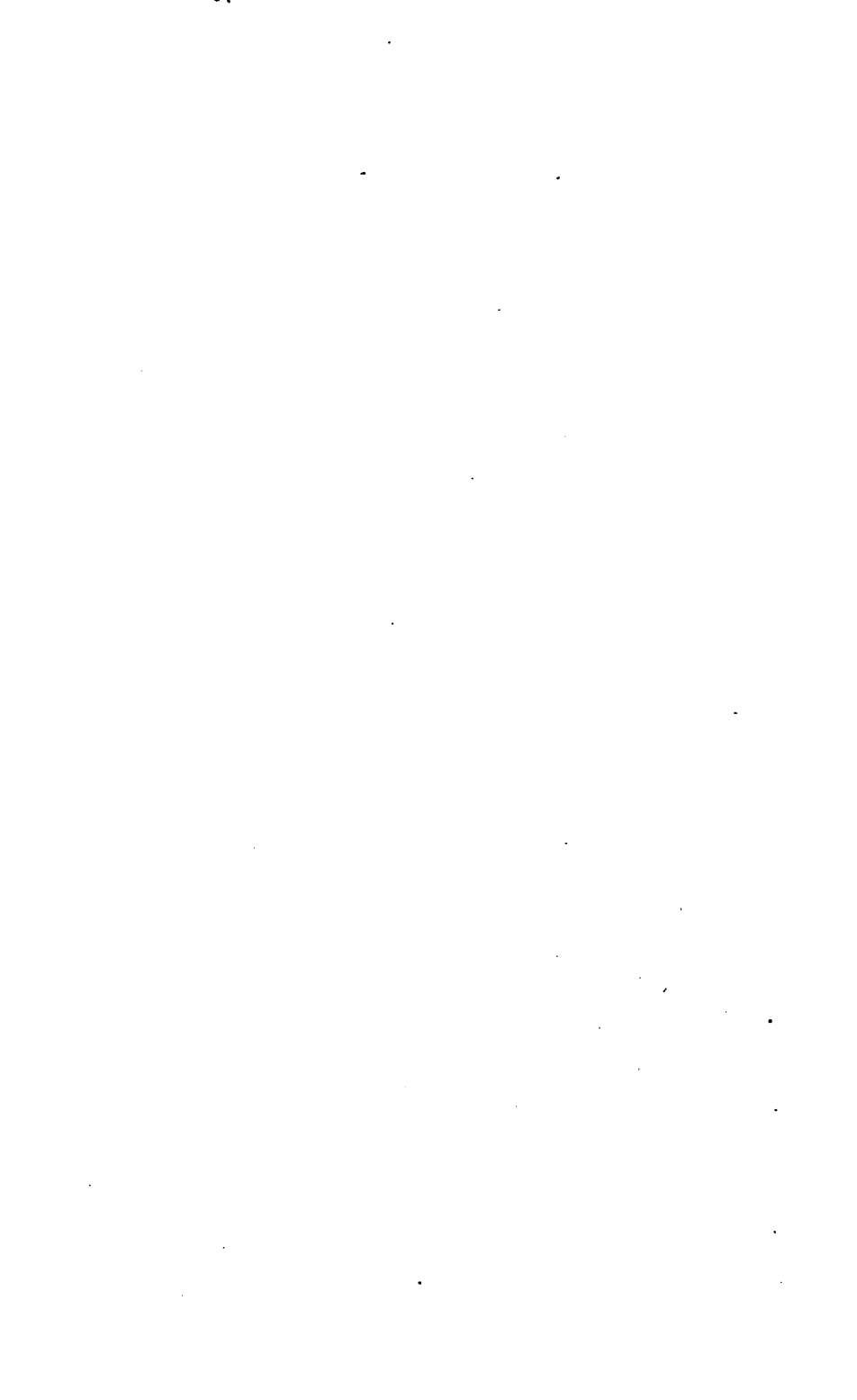
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